DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-7073
Title: Carlos Rashad Gould, Petitioner
v.
United States
Docketed: October 16, 2009
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (08-10857)
Decision Date: July 29, 2009
Rehearing Denied: August 28, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 16 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 16, 2009)
Nov 10 2009	Order extending time to file response to petition to and including December 16, 2009.
Dec 15 2009	Memorandum of respondent United States filed.
Dec 31 2009	DISTRIBUTED for Conference of January 15, 2010.
Jan 7 2010	DISTRIBUTED for Conference of January 22, 2010.
Jan 25 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED The petition for a writ of certiorari in No. 09-479 is GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument.
Feb 5 2010	Record received from U.S.C.A. for 5th Circuit. (1 envelope)
Feb 23 2010	Additional record received from U.S.C.A. 5th Circuti. (1 envelope containing 2 volumes of pleadings and transcripts)
Mar 1 2010	The time within which to file the joint appendix and petitioners' briefs on the merits is extended to and including April 30, 2010. VIDED.
Mar 1 2010	The time within which to file respondent's brief on the merits is extended to and including July 15, 2010. VIDED.
Mar 12 2010	Motion to appoint counsel filed by petitioner Carlos Rashad Gould.
Mar 24 2010	Motion DISTRIBUTED for Conference of April 16, 2010.
Apr 19 2010	Motion to appoint counsel filed by petitioner GRANTED. David L. Horan, Esquire, of Dallas, Texas is appointed to serve as counsel for the petitioner in this case.
Apr 30 2010	Joint appendix filed. (Statement of costs filed)
Apr 30 2010	Brief of petitioner Carlos Rashad Gould filed.
May 7 2010	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.

	VIDED.
May 7 2010	Brief amicus curiae of Families Against Mandatory Minimums filed. VIDED.
May 7 2010	Brief amicus curiae of American Bar Association VIDED.
Jul 15 2010	Brief of respondent United States filed. VIDED.
Jul 19 2010	Joint motion for divided argument filed by petitioners. VIDED.
Jul 20 2010	SET FOR ARGUMENT ON Monday, October 4, 2010.
Jul 29 2010	CIRCULATED.
Aug 13 2010	Reply of petitioner Carlos Rashad Gould filed. (Distributed)
Sep 3 2010	Joint motion for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Sep 7 2010	Justice Kagan is recused in this case.
Oct 4 2010	Argued. For petitioner in 09-7073: David L. Horan, Dallas, Tex. (Appointed by this Court.) For petitioner in 09-479: James E. Ryan, Charlottesville, Va. For respondent: Roy W. McLeese, Acting Deputy Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

No. 09-_____

IN THE

Supreme Court of the United States

CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fifth Circuit correctly hold, in direct conflict with the Second Circuit (but in accordance with several other circuits), that a mandatory minimum sentence provided by 18 U.S.C. § 924(c)(1)(A) applies to a count when another count already carries a greater mandatory minimum sentence?

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PETITION FOR WRIT OF CERTIORARI

Carlos Rashad Gould respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at No. 08-10857, 2009 WL 2258336. Pet. App. 1a-2a. The Fifth Circuit's order denying rehearing *en banc* is unreported. Pet. App. 3a.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Fifth Circuit was issued on July 29, 2009. Pet. App. 1a. The Fifth Circuit's order denying rehearing *en banc* was issued on August 28, 2009. Pet. App. 3a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 18 U.S.C. § 924(c)(1)(A):

> **Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–**
>
> (i) **be sentenced to a term of imprisonment of not less than 5 years;**

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

Gould pleaded guilty to Counts One and Three of the indictment in 2006. The factual resume supporting Gould's guilty plea admitted to the elements of Count One under 21 U.S.C. § 846 and of Count Three under 18 U.S.C. § 924(c)(1)(A). For Count One, the probation officer recommended an offense level of 28 and, based on a criminal history category of IV, a Guidelines range of 110 to 137 months. For Count Three, the probation officer recommended a range of 60 months under USSG § 2K2.4 and 18 U.S.C. § 924(c)(1)(A) to run consecutive to Count One's sentence.

At sentencing, Gould cited the decision by the U.S. Court of Appeals for the Second Circuit in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), and objected that, because of 18 U.S.C. § 924(c)(1)(A)'s introductory "except" clause, Count Three does not carry a 5-year mandatory minimum. Gould objected that this might impact his Guidelines range. The District Court—which had jurisdiction over the proceeding under 18 U.S.C. § 3231—overruled these objections. There is no suggestion that Gould did not preserve these objections for appeal.

The District Court calculated the Guidelines range to be 120 to 137 months for Count One and "60 months, to run consecutive to any other term of imprisonment," for Count 3. The District Court sentenced Gould to 137 months for Count One and 60 months for Count 3 and combined them for a 197-month term of

imprisonment. Gould reurged the objection that Count Three does not carry a mandatory minimum and that this might impact the Guidelines range. Gould further objected that the term of imprisonment is unreasonable. The District Court overruled these objections. The District Court never inquired about the correct Guidelines range in the event that Count Three carries no mandatory minimum. The District Court entered judgment on the sentence, and Gould appealed.

On appeal, relying on the unpublished decision in *United States v. Collins*, No. 06-30009, 2006 WL 2921225 (5th Cir. Oct. 12, 2006), as adopted by *United States v. London*, 568 F.3d 553 (5th Cir. 2009), the Fifth Circuit rejected Gould's argument that, because of the "except" clause, the 5-year mandatory minimum does not apply to Count Three. Pet. App. 1a-2a. The Fifth Circuit also rejected Gould's arguments of procedural and substantive unreasonableness. Pet. App. 2a. It affirmed Gould's sentence as a result. Pet. App. 2a. Rehearing *en banc* was later denied. Pet. App. 3a.

Gould now petitions this Court for a writ of certiorari.

SUMMARY OF THE ARGUMENT

This appeal concerns the proper interpretation and application of 18 U.S.C. § 924(c)(1)(A)'s "except" clause for mandatory minimum sentences involving drug and gun crimes. "Except to the extent that a greater minimum sentence is otherwise provided by ... any other provision of law," § 924(c)(1)(A) provides a 5-year mandatory minimum for possessing a firearm in furtherance of a drug-trafficking crime. Although the District Court applied this 5-year mandatory minimum to Count Three in sentencing Gould, doing so was erroneous. Under

§ 924(c)(1)(A)'s "except" clause, the 5-year mandatory minimum does not apply to Count Three because Count One carries a greater, 10-year mandatory minimum. The error renders Gould's sentence procedurally and substantively improper.

These conclusions are mandated by § 924(c)(1)(A)'s literal meaning, as the U.S. Court of Appeals for the Second Circuit made clear in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), debunking contrary decisions from several other circuits. Nonetheless, the Fifth Circuit relied on its unpublished decision in *United States v. Collins*, No. 06-30009, 2006 WL 2921225 (5th Cir. Oct. 12, 2006), as baldly adopted by *United States v. London*, 568 F.3d 553 (5th Cir. 2009), to reject Gould's argument under § 924(c)(1)(A) and *Whitley*. *See United States v. Gould*, No. 08-10857, 2009 WL 2258336, at *1 (5th Cir. July 29, 2009). The Second Circuit earlier rejected *Collins* in *Whitley* as being wrongly decided.

This Court has never addressed whether a § 924(c)(1)(A) mandatory minimum applies to a count when a greater mandatory minimum applies to another count. The issue impacts many cases because of § 924(c)(1)(A)'s significance and widespread use and has caused a split between (i) the Second Circuit on the one hand and (ii) the First, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits on the other hand. The government itself acknowledged this split and the issue's importance in opposing a petition for a writ of certiorari from the Seventh Circuit's decision in *United States v. Easter*, 553 F.3d 519 (7th Cir. 2009). *See* Brief for the United States in Opposition to Petition for a Writ of Certiorari at 7, 9-10, *United States v. McSwain*, No. 08-9560 (*petition for cert. filed* March 26, 2009). Indeed,

recognizing this issue's importance and the need for resolution, the Solicitor General has authorized the filing of a petition for certiorari from the Second Circuit's decision in *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), which presents the same issue that Gould now presents. *See* Brief for the United States in Opposition to Petition for a Writ of Certiorari at 7, *United States v. McSwain*, No. 08-9560 (*petition for cert. filed* March 26, 2009). This issue calls for *de novo* review and is the primary and threshold issue here.

The Court should grant a writ of certiorari, either separately or together with any writ of certiorari in *Williams*, to resolve the division among the circuits over this issue of exceptional national importance. The Court should then adopt the Second Circuit's interpretation of § 924(c)(1)(A), vacate Gould's sentence, and remand for resentencing.

I. THE COURTS OF APPEALS ARE DEEPLY SPLIT AS TO WHETHER A 18 U.S.C. § 924(c)(1)(A) MANDATORY MINIMUM APPLIES TO A COUNT WHEN A GREATER MANDATORY MINIMUM APPLIES TO ANOTHER COUNT.

This case presents the Court with a deep, well-developed conflict between the courts of appeals. On the one hand, the Second Circuit has held that a 18 U.S.C. § 924(c)(1)(A) mandatory minimum does not apply to a count when a greater mandatory minimum applies to another count. *United States v. Whitley*, 529 F.3d 150, 153, 158 (2d Cir. 2008); *see also United States v. Williams*, 558 F.3d 166, 167-68 (2d Cir. 2009). On the other hand, the First, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have held that a § 924(c)(1)(A) mandatory minimum applies regardless of whether a greater mandatory minimum applies to another

count. *See United States v. Parker*, 549 F.3d 5, 10-12 (1st Cir. 2008); *United States v. Abbott*, 574 F.3d 203, 206-11 (3d Cir. 2009); *United States v. Studifin*, 240 F.3d 415, 417-24 (4th Cir. 2001); *United States v. Collins*, No. 06-30009, 2006 WL 2921225, at *1-2 (5th Cir. Oct. 12, 2006) (unpublished), *holding and reasoning adopted by United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009); *United States v. Jolivette*, 257 F.3d 581, 585-87 (6th Cir. 2001); *United States v. Easter*, 553 F.3d 519, 524-27 (7th Cir. 2009); *United States v. Alaniz*, 235 F.3d 386, 386-90 (8th Cir. 2000). This conflict is squarely presented and ripe for the Court's immediate resolution.

Under § 924(c)(1)(A), anyone who possesses, brandishes, or discharges a firearm to further a drug-trafficking or violent crime shall, in addition to punishment for the drug-trafficking or violent crime, be sentenced to a certain term of imprisonment, unless any other provision of law provides a greater mandatory minimum:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;

> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A). In other words, as the Second Circuit correctly held in *Whitley*, when "a greater minimum sentence is otherwise provided ... by any other provision of law" to which a defendant will be sentenced, the defendant is not subject to § 924(c)(1)(A)'s otherwise mandatory 5-, 7-, or 10-year sentences for possessing, brandishing, or discharging a firearm. *Whitley*, 529 F.3d at 158 (discussing § 924(c)(1)(A)).

II. THE GOVERNMENT HAS ACKNOWLEDGED THE CIRCUIT SPLIT AND THE IMPORTANCE OF THIS ISSUE, WHICH GOULD SQUARELY PRESENTS HERE.

A *pro se* defendant recently filed a petition for a writ of certiorari from the Seventh Circuit's decision in *Easter*. *See* Petition for a Writ of Certiorari, *United States v. McSwain*, No. 08-9560 (*petition for cert. filed* March 26, 2009). As Gould does here, the defendant has sought this Court's review of the issue whether § 924(c)(1)(A)'s mandatory minimum applies to a count when a greater mandatory minimum applies to another count. *Id.* at 2, 9-10.

The government has opposed the petition, arguing that the case, for two reasons, is "not a suitable vehicle for resolving the conflict among the courts of appeals over" this issue. *See* Brief for the United States in Opposition to Petition for a Writ of Certiorari at 10, *United States v. McSwain*, No. 08-9560 (*petition for cert. filed* March 26, 2009). First, the case arises in "the unusual posture of a decision by the court of appeals addressing the narrow issue of whether the

arguments petitioner advanced in his *pro se* response to his counsel's *Anders* brief warranted full briefing by counsel." *Id.* at 10-11. According to the government, the posture may "obscure this Court's review of the underlying statutory question." *Id.* at 11. Second, *McSwain*'s petitioner allegedly forfeited the § 924(c)(1)(A) argument by failing to raise it in the district court and, thus, would have to show plain error to get relief. *Id.*

That said, the government has agreed that § 924(c)'s "except" clause will require review by this Court. *See id.* at 7, 9-10. As the government explained, the "courts of appeals are divided on the meaning of the 'except' clause in Section 924(c)," and the "issue is an important and recurring one in federal prosecutions." *Id.* at 9-10. Thus, the "Solicitor General has authorized the filing of a petition for certiorari from the Second Circuit's decision" in *Williams*. *Id.* at 7.

Although *McSwain* may not be the proper vehicle for reviewing § 924(c)(1)(A), Gould's case is. There is no suggestion that he failed to preserve his objections for the appeal of this issue. It is the primary and threshold issue here and, contrary to *McSwain*, calls for *de novo* review.

III. THE SECOND CIRCUIT INTERPRETED § 924(c)(1)(A) CORRECTLY IN *UNITED STATES V. WHITLEY*.

In *Whitley*, the defendant violated § 924(c)(1)(A) by discharging a firearm during a violent crime. *See Whitley*, 529 F.3d at 151. The defendant also violated 18 U.S.C. §§ 922(g)(1) and 924(e) by possessing a firearm after having been convicted of at least three violent felonies or serious drug offenses. *See id.* The district court held that the count under § 924(c)(1)(A) carried a 10-year mandatory

minimum despite the other count's greater, 15-year mandatory minimum. *See id.* at 151-52.

Applying "what [§ 924(c)(1)(A)] literally says," the Second Circuit reversed the district court and remanded for resentencing because the count under § 924(c)(1)(A) did not have a mandatory minimum: "Read literally, as we believe the 'except' clause of subsection 924(c)(1)(A) should be, the clause exempts [the defendant] from the consecutive ten-year minimum sentence for discharging a firearm because he is subject to the higher fifteen-year minimum sentence provided by section 924(e)." *Id.* at 153, 158.

The government had urged the Second Circuit to reject § 924(c)(1)(A)'s literal meaning, arguing that it (i) was unsupported by the balance of the statute's text, design, and purpose; (ii) would produce illogical and distorted results that Congress did not intend; and (iii) had been rejected by other circuits. *Id.* at 153. The Second Circuit rejected each argument. *See id.* at 153-58.

A. § 924(c)(1)(A)'s Text, Design, and Purpose Support the Second Circuit's Holding.

Text. The government argued that the "except" clause provides that a court must impose one of § 924(c)(1)(A)'s mandatory minimums "unless some other statutory provision requires a higher minimum *consecutive* sentence for a *firearm* offense." *Id.* at 153 (internal quotation marks omitted). The Second Circuit rejected this textual argument because it "curiously departs from the wording of the 'except' clause," which does not contain the words "consecutive" or "firearm." *Id.*

Design. The government's "design" argument came from the Eighth Circuit's decision in *Alaniz*. *Id.* As the Second Circuit explained, the Eighth Circuit declined to read the "except" clause literally in *Alaniz*. *See id.* It worried that §§ 924(c)(1)(B) and 924(c)(1)(C), which provide enhanced penalties based on the type of weapon involved in an offense and based on prior convictions, would be "'grammatically and conceptually incomplete'" without § 924(c)(1)(A)'s "except" clause. *Id.* at 153-54 (quoting *Alaniz*, 235 F.3d at 389). The Eighth Circuit noted that § 924(c)'s prior version set these enhanced penalties in "'an undivided subsection,'" such that the prior version did not have any numbered or lettered subdivisions. *Id.* (quoting *Alaniz*, 235 F.3d at 388). According to the Eighth Circuit, § 924(c)'s current version grammatically and conceptually needs the "except" clause "'to link the remaining prefatory language in (c)(1)(A) to each sentence length set forth in subdivisions (c)(1)(B) and (c)(1)(C).'" *Id.* at 154 (quoting *Alaniz*, 235 F.3d at 389).

Noting "the objection that even a grammatical imperfection would be a dubious basis for adding ... a ... consecutive sentence contrary to the plain wording of a statute," the Second Circuit disagreed with the Eighth Circuit. *Id.* According to the Second Circuit, the "except" clause does not merely operate as a link between subsections. *See id.* First, removing the "except" clause from § 924(c)(1)(A) would not actually cause a grammatical problem; the Eighth Circuit never even articulated one. *See id.* Second, the Eighth Circuit's design rationale does not account for § 924(c)(1)(A)'s "broad phrase 'or by any other provision of law.'" *Id.* (quoting § 924(c)(1)(A)). "[I]f linking the various provisions of subsection (c)(1)

together was the sole purpose of the 'except' clause, the clause would have ended with the phrase 'provided by this subsection,' and the phrase 'or by any other provision of law' would have been unnecessary." *Id.* (quoting § 924(c)(1)(A)). Third, before Congress passed § 924(c)'s current version, the Department of Justice submitted its preferred version of the statute that included lettered and numbered subdivisions without the "except" clause. *See id.* As the Second Circuit noted, "[a]pparently the Department did not then think the 'except' clause was needed to avoid a grammatical problem." *Id.*

Purpose. In addition to containing no lettered or numbered subdivisions, § 924(c)'s prior version provided a 5-year mandatory minimum for anyone who "uses or carries" a firearm during a drug-trafficking or violent crime. *Id.* This Court held that this required "'active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.'" *Id.* at 154-55 (quoting *Bailey v. United States*, 516 U.S. 137, 143 (1995)). In response to this holding, Congress amended § 924(c) by extending its coverage to any person who "possesses a firearm" in furtherance of a drug-trafficking or violent crime. *Id.* at 155 (internal quotation marks omitted). The amendment also provided a series of increased minimum sentences. *See id.*

In *Whitley*, the government argued that reading the "except" clause literally to exempt a defendant from § 924(c)(1)(A)'s mandatory minimums when a greater mandatory minimum applies to another count would be inconsistent with the congressional purpose to expand the section's coverage and increase penalties. *See*

id. The Second Circuit rejected this argument, as it is not inconsistent with any intent to enhance firearm penalties "for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences ... only the higher minimum should apply." *Id.* Rather, "such a sentencing pattern seems eminently sound." *Id.*

B. Applying § 924(c)(1)(A) As Written Does Not Cause "Illogical Results."

The government also argued in *Whitley* that reading the "except" clause literally would produce "illogical results" by, allegedly, punishing defendants who commit serious crimes less than defendants who commit lesser crimes. *Id.* The government offered this example:

> [A] defendant who brandished a firearm, resulting in a seven-year minimum consecutive sentence, *see* 18 U.S.C. § 924(c)(1)(A)(ii), would be subject to a twelve-year minimum sentence if he also possessed 500 grams of cocaine, resulting in five-year minimum sentence, *see* 21 U.S.C. § 841(b)(1)(B), but would be subject to only a ten-year minimum sentence if he possessed five kilograms of cocaine, resulting in a ten-year minimum sentence, *see* 21 U.S.C. § 841(b)(1)(A), because that sentence is a higher minimum than the brandishing minimum.

See id.

The Second Circuit dismissed this example, however, as an apparent anomaly that "disappears upon close scrutiny" and does not warrant rejecting § 924(c)(1)(A)'s "except" clause's literal meaning. *Id.* "The reason is that no court would be *required* to sentence the five-kilogram defendant to only the ten-year minimum." *Id.* After properly calculating the Guidelines range, a court could

impose a substantively reasonable sentence for brandishing the firearm that is below the statutory maximum. *See generally id.*

C. Decisions From Other Circuits Precede The Second Circuit's More Thorough Analysis In *Whitley*.

The government finally argued in *Whitley* that the Second Circuit should follow decisions from other circuits that have declined to read the "except" clause literally. *See id.* at 156 (citing *Studifin*, *Collins*, *Jolivette*, and *Alaniz*). Unpersuaded, the Second Circuit found "substantial grounds" for reading the "except" clause literally despite these contrary decisions. *Id.*

The *Whitley* court noted that this Court has repeatedly instructed lower courts "to give statutes a literal reading and apply the plain meaning of the words Congress has used." *Id.* (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The Court reversed a court of appeals just last year for "'contort[ing]' the 'plain terms'" of a criminal statute. *Id.* (quoting *United States v. Rodriquez*, 128 S. Ct. 1783, 1788 (2008)). Although courts may depart from a statute's literal meaning under certain circumstances, "other than the decisions cited above that have rewritten the 'except' clause in different ways to escape its plain meaning," the Second Circuit found no decision that ever rejected "the literal meaning of statutory language to the detriment of a criminal defendant." *Id.*

The Second Circuit also explained that the decisions from other circuits all originated from the "Eighth Circuit's reliance in *Alaniz* on the questionable and unexplained argument ... that a literal reading would render section 924(c) grammatically and conceptually incomplete." *Id.* at 157 (citing *Studifin*, 240 F.3d at

422-423; *Collins*, 2006 WL 2921225, at *1; *Jolivette*, 257 F.3d at 587; *United States v. Baldwin*, No. 00-1630, 2002 WL 726485, at *2 (6th Cir. Apr. 23, 2002)) (internal quotation marks omitted). It further noted that, contrary to the Fourth Circuit's concern in *Studifin*, reading the "except" clause literally does not displace § 924(c)'s requirement that "'no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment ....'" *Id.* at 158 (quoting § 924(c)(1)(D)(ii)). A sentence imposed for violating section 924(c)(1)(A) can run consecutively to another sentence even when the sentence under section 924(c)(1)(A) has no mandatory minimum. *See id.*

As the Second Circuit correctly concluded, none of the government's arguments provides any basis for departing from § 924(c)(1)(A)'s plain meaning. *See id.* The statute's "except" clause plainly provides that § 924(c)(1)(A)'s mandatory minimums do not apply where "any other provision of law" subjects a defendant to a greater mandatory minimum. *See* § 924(c)(1)(A).

D. Decisions Following *Whitley* Have Further Deepened the Circuit Split.

After the Second Circuit's decision in *Whitley*, the circuit split over § 924(c)(1)(A)'s interpretation and application developed even further. The Second Circuit reaffirmed *Whitley* in *Williams*, whereas the First, Third, and Seventh Circuits issued decisions that conflict with the Second Circuit's decisions and align with the Fourth's, Fifth's, and Eighth's decisions. *Compare Williams*, 558 F.3d at 167-68, *with Parker*, 549 F.3d at 10-12, *Abbott*, 574 F.3d at 206-11, *and Easter*, 553 F.3d at 525-27.

IV. GOULD CAN OBTAIN RELIEF FOR THE FIFTH CIRCUIT'S IMPROPER APPLICATION OF § 924(c)(1)(A).

Over Gould's objection, the District Court erroneously applied § 924(c)(1)(A)'s 5-year mandatory minimum to Count Three. As the Second Circuit made clear in *Whitley* and *Williams*, a defendant is not subject to § 924(c)(1)(A)'s 5-year mandatory minimum when "a greater minimum sentence is otherwise provided ... by any other provision of law" to which he will be sentenced. *See* § 924(c)(1)(A). Here, "any other provision of law" includes 21 U.S.C. § 846, and the 10-year mandatory minimum for Gould's violation of § 846 (Count One) exceeds the 5-year mandatory minimum that would otherwise apply for his violation of § 924(c)(1)(A) (Count Three). Because this greater, 10-year mandatory minimum applies to Count One, no mandatory minimum applies to Count Three.

Erroneously applying § 924(c)(1)(A)'s 5-year mandatory minimum to Count Three rendered Gould's sentence procedurally improper. Count Three's "guideline sentence is the minimum term of imprisonment required by statute." USSG § 2k2.4(b) (setting forth the Guidelines for convictions under § 924(c)(1)(A)). Because the "except" clause exempts Count Three from a minimum term of imprisonment, this means that its properly calculated Guidelines sentence is 0 months, not 60 months as calculated by the District Court. *See Gall v. United States*, 128 S. Ct. 586, 597 (2007) (recognizing that procedural error includes miscalculating the proper Guidelines sentence). Gould's sentence resulted from this procedural error because there is no basis for concluding that the District Court contemplated the correct Guidelines range to be 0 months.

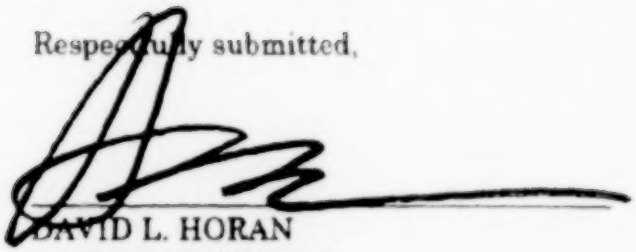
Erroneously applying § 924(c)(1)(A)'s 5-year mandatory minimum also rendered Gould's sentence substantively improper. First, because of its failure to contemplate the correct Guidelines range, the District Court failed to consider the extent to which Gould's 197-month sentence deviates from the properly calculated Guidelines range of 120 to 137 months. *See id.* at 597 (holding that a district court "must consider the extent of the deviation"). Second, in light of 18 U.S.C. § 3553(a)'s factors, the District Court did not have a sufficiently compelling justification for departing by 60 months from the top of the properly calculated Guidelines range.

These procedural and substantive improprieties, together or alone, require that Gould's sentence be vacated and remanded for further resentencing. But the Fifth Circuit never addressed them. Instead, the Fifth Circuit avoided them by relying erroneously on its adoption of the unpublished decisions in *Collins* to reject Gould's argument that, because of the "except" clause, the 5-year mandatory minimum does not apply to Count Three. Pet. App. 1a-2a.

CONCLUSION

The Court should grant this petition for a writ of certiorari, either separately or together with any writ of certiorari in *Williams*, to resolve the circuit split as to whether a § 924(c)(1)(A) mandatory minimum applies to a count when a greater mandatory minimum applies to another count. On review, the Court should vacate Gould's sentence and remand for further resentencing.

Respectfully submitted,



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Counsel for Petitioner

October 16, 2009

United States Court of Appeals, Fifth Circuit.

Carlos Rashad GOULD, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

No. 08-10857

July 29, 2009

Before DAVIS, GARZA and PRADO, Circuit Judges.

PER CURIAM:*

Carlos Rashad Gould pleaded guilty to conspiracy to possess with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841, 846 (Count One); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count Three). On resentencing following remand from this court, the district court sentenced Gould to 137 months in prison on Count One, within the advisory guidelines range, and to a mandatory consecutive sentence of five years on Count Three, for a total of 197 months. Gould now challenges that sentence. For the following reasons, we affirm.

Gould first contends that the district court committed procedural error by imposing a mandatory consecutive five-year term on the § 924(c) charge. Gould's contention is based on the so-called "exception" clause of § 924(c). In an unpublished opinion in 2006, we joined three other circuits to reject this same argument. *See United States v. Collins*, 205 F. App'x 196, 197-98 (5th Cir. 2006). While this appeal was pending, we adopted the reasoning and holding of *Collins* in

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

a published decision. *United States v. London*, __ F.3d __, No. 07-31092, 2009 WL 1362593, at *8 (5th Cir. May 18, 2009). Accordingly, we reject Gould's argument.

Gould next contends that this sentence was substantively unreasonable on several grounds. He first argues that the misapplication of the five-year minimum, which resulted in a total of 197 years, rendered his sentence substantively unreasonable. Given our disposition of his challenge to the five-year mandatory minimum, this argument necessarily fails.

Gould also challenges the substantive reasonableness of the sentence in light of his efforts while incarcerated to improve his education, the assistance he provided the Government in prosecuting others, and the disparity under the Sentencing Guidelines between sentences for crack cocaine offenses and powder cocaine offense. In light of the district court's careful consideration of the 18 U.S.C. § 3553(a) factors, the evidence regarding the facts of this case, and the deferential standard of review, we discern no abuse of discretion in the district court's choice of a within-guidelines sentence. *See Gall v. United States*, 128 S. Ct. 586, 597 (2007); *United States v. Mondragon-Santiago*, 564 F.3d 357, 360 (5th Cir. 2009).

AFFIRMED.

United States Court of Appeals, Fifth Circuit.

Carlos Rashad GOULD, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

No. 08-10857

August 28, 2009

ON PETITION FOR REHEARING *EN BANC*

Before DAVIS, GARZA, and PRADO, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

MEMORANDUM

No. 09-7073

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS RASHAD GOULD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted under 18 U.S.C. 924(c)(1)(A), which provides for minimum prison sentences "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." He contends (Pet. 3-5) that the "except" clause of Section 924(c)(1)(A) exempts him from the five-year mandatory consecutive sentence imposed by that provision because he also received a greater mandatory minimum sentence on a different count of conviction. The court of appeals rejected that argument and affirmed petitioner's sentence, which includes the

consecutive five-year term prescribed by Section 924(c)(1)(A). Pet. App. 1a-2a.

Petitioner notes (Pet. 4-5) that the court of appeals' decision conflicts with the Second Circuit's decisions in United States v. Whitley, 529 F.3d 150 (2d Cir. 2008), and United States v. Williams, 558 F.3d 166 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed October 20, 2009). In Williams, the Second Circuit held, following its decision in Whitley, that the "except" clause exempts a defendant from any sentence under Section 924(c)(1)(A) whenever he is subject to a higher mandatory sentence for a different offense "arising from the same criminal transaction or operative set of facts." 558 F.3d at 171-172.

The government filed a petition for a writ of certiorari to review the Second Circuit's decision in Williams. United States v. Williams, No. 09-466, petition for cert. pending (filed October 20, 2009). As that petition explains, the Second Circuit's interpretation of the "except" clause is incorrect. Eight other courts of appeals have addressed this issue, and none has adopted the Second Circuit's reading of the statute. See United States v. Segarra, 582 F.3d 1269, 1272-1273 (11th Cir. 2009) (per curiam); United States v. Abbott, 574 F.3d 203, 208-211 (3d Cir. 2009), petition for cert. pending, No. 09-479 (filed October 19, 2009); United States v. London, 568 F.3d 553, 564 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); United States v. Pulido, 566 F.3d 52, 65 & n.6 (1st Cir. 2009),

petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); United States v. Easter, 553 F.3d 519, 525-527 (7th Cir. 2009) (per curiam), petitions for cert. pending, No. 08-9560 (filed Mar. 26, 2009), and No. 08-10584 (filed May 20, 2009); United States v. Jolivette, 257 F.3d 581, 586-587 (6th Cir. 2001); United States v. Studifin, 240 F.3d 415, 421-424 (4th Cir. 2001); United States v. Alaniz, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). For the reasons stated in the Williams petition, that case provides an appropriate vehicle to resolve this conflict between the courts of appeals on this issue.

The Court's disposition of Williams will likely affect the proper resolution of this case. Accordingly, this petition should be held for United States v. Williams, and then disposed of as appropriate in light of this Court's disposition of that case.*

ELENA KAGAN
Solicitor General
Counsel of Record

DECEMBER 2009

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* The government waives any further response to the petition unless this Court requests otherwise.

JOINT APPENDIX

Supreme Court, U.S.
FILED
APR 30 2010
CLERK

No. 09-7073

In The
Supreme Court of the United States

CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
(WICHITA FALLS)

No. 7:05-cr-00020-O

UNITED STATES OF AMERICA, PLAINTIFF

v.

BRYANT, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
09/07/2005	1	INDICTMENT as to Alfred William Bryant (1) count(s) 1, 2, 3-4, 5, Carlos Rashad Gould (2) count(s) 1, 2, 3-4, 6, 7. (eat,) (Entered: 09/08/2005)
	*	* *
04/24/2006	67	PLEA AGREEMENT as to Carlos Rashad Gould (ttm,) (Entered: 04/26/2006)
04/24/2006	68	Factual Resume as to Carlos Rashad Gould (ttm,) (Entered: 04/26/2006)
	*	* *
05/08/2006	87	ORDER ACCEPTING PLEA & PLEA AGREEMENT as to Carlos Rashad Gould. (aps,) (Entered: 05/09/2006)

* * *

10/05/2006	109	AMENDED JUDGMENT as to Carlos Rashad Gould (2), Count(s) 1, BOP 210 months to be served consecutively. SR 5 years on each count; MSA $100; Count(s) 2, 4, 6, 7, dismissed on government's motion; Count(s) 3, BOP 60 months to be served consecutively. SR 5 years on each count; MSA $100 (Signed by Judge Jerry Buchmeyer on 10/5/06) (ttm,) (Entered: 10/10/2006)

* * *

05/22/2008	137	Opinion of USCA (certified copy) in accordance with USCA judgment re 105 Notice of Appeal filed by Carlos Rashad Gould. We VACATE Goulds sentence and REMAND for resentencing in accordance with this opinion. (ttm) (Entered: 05/22/2008)

* * *

08/20/2008	152	Minute Entry for proceedings held before Judge Reed C O'Connor: Re-Sentencing held on 8/20/2008 for Carlos Rashad Gould (2), Count(s) 1, BOP 210 months to be

		served consecutively. SR 5 years on each count; MSA $100 BOP 197 MONTHS, SR 5 YEARS, MSA $100; Count(s) 2, 4, 6, 7, dismissed on government's motion; Count(s) 3, BOP 60 months to be served consecutively. SR 5 years on each count; MSA $100, BOP 197 MONTHS, SR 5 YEARS, MSA $100. Attorney Appearances: AUSA – John Boyle; Defense – David Horan, Paul Thess. (Court Reporter Debbie Saenz.) Time in Court: 2 hours, 15 minutes. (ttm) (Entered: 08/29/2008)
09/02/2008	153	NOTICE OF APPEAL to the Fifth Circuit by Carlos Rashad Gould as to Carlos Rashad Gould. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (Horan, David) Modified on 3/12/2009 (ttm). (Entered: 09/02/2008)
09/03/2008	154	AMENDED JUDGMENT as to Carlos Rashad Gould (2), Count(s) 1, BOP 210 months to be served consecutively.

		SR 5 years on each count; AMENDED: MSA $100 BOP 137 MONTHS, SR 5 YEARS, MSA $100; Count(s) 2, 4, 6, 7, dismissed on government's motion; Count(s) 3, BOP 60 months to be served consecutively. SR 5 years on each count; AMENDED: MSA $100, BOP 60 MONTHS, SR 5 YEARS, MSA $100 (Signed by Judge Reed C O'Connor on 9/3/08) (ttm) (Entered: 09/04/2008)
09/05/2008	155	NOTICE OF APPEAL to the Fifth Circuit as to 154 Amended Judgment, by Carlos Rashad Gould. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (ttm) (Entered: 09/09/2008)
	*	* *
10/15/2008	158	TRANSCRIPT of Resentencing Proceedings as to Carlos Rashad Gould held on 8/20/08 before Judge Reed O'Connor. Court Reporter/ Transcriber Debbie Saenz, Telephone number 214-753-2298. Parties are notified of

		their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Redaction Request – Transcript must be filed within 21 days. If no such Request is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. Redaction Request due 11/5/2008. Redacted Transcript Deadline set for 11/17/2008. Release of Transcript Restriction set for 1/13/2009. (dgs) (Entered: 10/15/2008)
	*	* *
09/10/2009	177	Opinion of USCA (certified copy) in accordance with USCA judgment re 155 Notice of Appeal, filed by Carlos Rashad Gould, 153 Notice of Appeal, filed by Carlos Rashad Gould. (aps) (Entered: 09/10/2009)
09/10/2009	178	JUDGMENT of USCA (certified copy) as to Carlos Rashad Gould re 155 Notice

of Appeal, 153 Notice of Appeal. This cause was considered on the record on appeal and the briefs on file. It is ordered and adjudged that the judgment of the District Court is affirmed. (aps) (Entered: 09/10/2009)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10857

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CARLOS RASHAD GOULD (#33934-177),
DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
01/15/2009	Appellant's Brief filed by Appellant Carlos Rashad Gould. Disk Provided [Y/N]: y Sufficient [Y/N]: y [6197933-1] [08-10857] A/Pet's Brief ddl satisfied. E/Res's Brief due on 2/17/09 for USA. (GLP)
	* * *
02/13/2009	APPELLEE'S BRIEF FILED by USA (ROA received with brief). # of Copies Provided: 7 E/Res's Brief deadline satisfied. Reply Brief due on 02/27/2009 for Appellant Carlos Rashad Gould [08-10857] (GLP)
	* * *
02/27/2009	APPELLANT'S REPLY BRIEF FILED by Mr. Carlos Rashad Gould.. # of Copies Provided: 7 Reply Brief deadline satisfied [08-10857] (GLP)

* * *

04/13/2009 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellant Mr. Carlos Rashad Gould [08-10857] SEND TO SCR. JUDGE AND PANEL – [Edited 04/14/2009 by KSW] (GLP)

06/01/2009 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA [08-10857] (GLP)

06/05/2009 RESPONSE filed by Mr. Carlos Rashad Gould [6296171-1] to the 28j letter filed by Appellee USA on 6/1/09, in 08-10857 [6291419-2] Date of Service: 06/04/2009 [08-10857] (GLP)

07/29/2009 UNPUBLISHED OPINION FILED. [08-10857 Affirmed] Judge: WED, Judge: EMG, Judge: ECP. Mandate pull date is 08/19/2009 for Appellant Carlos Rashad Gould [08-10857] (ARC)

07/29/2009 JUDGMENT ENTERED AND FILED. [08-10857] (ARC)

08/12/2009 PETITION filed by Appellant Mr. Carlos Rashad Gould for rehearing en banc [6343294-2] Number of Copies:19. Mandate pull date canceled.. Date of Service: 08/11/2009. [08-10857] (SDH)

08/28/2009 COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Carlos Rashad Gould [6343294-2] Mandate pull date is 09/04/2009. [08-10857] (RSM)

* * *

01/29/2010 SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Carlos Rashad Gould in 08-10857 on 01/25/2010. [6459470-1] [08-10857] (CAV)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

UNITED STATES OF AMERICA	§	No. 7:05-CR-20-R
	§	**ECF**
v.	§	
	§	
CARLOS RASHAD GOULD (02)	§	

FACTUAL RESUME

(Filed Apr. 24, 2006)

Carlos Rashad Gould, the defendant, Dean A. Sanders, the defendant's attorney, and the government, represent the following elements and facts to this Honorable Court as follows:

ELEMENTS OF THE OFFENSES

In order to prove the offenses as alleged in Counts One and Three of the indictment filed on September 7, 2005, the government must prove each of the following elements beyond a reasonable doubt:

Count One

Conspiracy to Possess with Intent to Distribute 50 Grams or More of a Mixture or Substance Containing a Detectable Amount of Cocaine Base (Violation of 21 U.S.C. § 846)

First: That two or more persons, directly or indirectly, reached an agreement to possess with intent to distribute cocaine base, also known as "crack" cocaine;

Second: That the defendant knew of the unlawful purpose of the agreement;

Third: That the defendant joined the agreement willfully, that is, with the intent to further its unlawful purpose; and

Fourth: That the overall scope of the conspiracy involved more than 50 grams of a mixture or substance containing a detectable amount of cocaine base.

Count Three

Possession of a Firearm in Furtherance of a Drug Trafficking Crime (Violation of 18 U.S.C. §§ 924(c)(1)(A))

First: That the defendant committed a drug trafficking crime, namely conspiracy to possess with intent to distribute 50 grams or more of cocaine base, as alleged in Count One; and

Second: That the defendant knowingly possessed a firearm in furtherance of his commission of this drug trafficking crime.

STIPULATED FACTS

On May 9, 2005, officers with the Wichita Falls Police Department executed a search warrant targeting drugs at a house located at 806 Gerald Street in Wichita Falls, Texas, which is in the Northern District of Texas. Alfred William Bryant was named in the search warrant as the person suspected of selling "crack" cocaine there. Officers made entry into the house and discovered Bryant inside amidst illegal

drugs and a loaded firearm. Gould fled the house with cocaine base, powdered cocaine, and marijuana on his person. After a short chase, Gould was apprehended and officers discovered and seized the drugs from his person. In total, officers seized 29.33 grams (net weight) of cocaine base, 12.67 grams (net weight) of powdered cocaine, along with marijuana from Gould's person.

Officer searched the residence and seized 61.49 grams (net weight) of cocaine base, 10.01 grams of powdered cocaine, and a quantity of marijuana. Officers also seized two firearms (a Glock, Model 22, .40 caliber pistol, bearing serial number YZ772, and a Norinco, Model SKS, 7.62 x 29 caliber rifle, bearing serial number 99144), loose rounds of ammunition for the SKS, a box of 12 gauge shotgun shells, drug scales, $197.00 in U.S. currency, and a security monitoring system inside the residence. Officers also found $200.00 in U.S. currency on Bryant.

Officers also searched a car that was parked next to the residence. Inside the car, officers found and seized Gould's social security card, a total of 2.02 grams (net weight) of cocaine base, three firearms (a sawed-off Winchester 12 gauge shotgun, bearing no serial number, a Glock, Model 17, 9 millimeter pistol, bearing serial number CF988, and a HI Point, Model 995, 9 millimeter rifle, bearing serial number B87256), a military "flack" jacket, and loose rounds of ammunition. In total, officers seized 92.87 grams (net weight) of cocaine base and five firearms with the

other items of evidence seized during the execution of the search warrant.

The defendant agrees and stipulates that on or about May 9, 2005, he did knowingly and intentionally conspire with Bryant and others to distribute, and to possess with intent to distribute, 50 grams or more of a mixture or substance containing a detectable amount of cocaine base, a controlled substance, as alleged in Count One. Furthermore, the defendant agrees and stipulates that, aided and abetted by Bryant and others, he knowingly possessed firearms, which included the HI Point, Model 995, 9 millimeter rifle, bearing serial number B87256, in furtherance of his commission of this drug trafficking crime, as alleged in Count Three.

AGREED TO AND SIGNED this 24 day of April, 2006.

/s/ Carlos Gould
Carlos Rashad Gould
Defendant

/s/ Dean A. Sanders
Dean A. Sanders
Attorney for Defendant

RICHARD B. ROPER
UNITED STATES ATTORNEY

/s/ Gary C. Tromblay
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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10857
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CARLOS RASHAD GOULD,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas
USDC No. 7:05-CR-20-2

(Filed Jul. 29, 2009)

Before DAVIS, GARZA and PRADO, Circuit Judges.

PER CURIAM:*

Carlos Rashad Gould pleaded guilty to conspiracy to possess with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

§§ 841, 846 (Count One); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count Three). On resentencing following remand from this court, the district court sentenced Gould to 137 months in prison on Count One, within the advisory guidelines range, and to a mandatory consecutive sentence of five years on Count Three, for a total of 197 months. Gould now challenges that sentence. For the following reasons, we affirm.

Gould first contends that the district court committed procedural error by imposing a mandatory consecutive five-year term on the § 924(c) charge. Gould's contention is based on the so-called "exception" clause of § 924(c). In an unpublished opinion in 2006, we joined three other circuits to reject this same argument. *See United States v. Collins,* 205 F. App'x 196, 197-98 (5th Cir. 2006). While this appeal was pending, we adopted the reasoning and holding of *Collins* in a published decision. *United States v. London,* ___ F.3d ___, No. 07-31092, 2009 WL 1362593, at *8 (5th Cir. May 18, 2009). Accordingly, we reject Gould's argument.

Gould next contends that his sentence was substantively unreasonable on several grounds. He first argues that the misapplication of the five-year minimum, which resulted in a total sentence of 197 years, rendered his sentence substantively unreasonable. Given our disposition of his challenge to the five-year mandatory minimum, this argument necessarily fails.

Gould also challenges the substantive reasonableness of the sentence in light of his efforts while incarcerated to improve his education, the assistance he provided the Government in prosecuting others, and the disparity under the Sentencing Guidelines between sentences for crack cocaine offenses and powder cocaine offense. In light of the district court's careful consideration of the 18 U.S.C. § 3553(a) factors, the evidence regarding the facts of this case, and the deferential standard of review, we discern no abuse of discretion in the district court's choice of a within-guidelines sentence. *See Gall v. United States,* 128 S. Ct. 586, 597 (2007); *United States v. Mondragon-Santiago,* 564 F.3d 357, 360 (5th Cir. 2009).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10857

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CARLOS RASHAD GOULD,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas, Wichita Falls

ON PETITION FOR REHEARING EN BANC

(Filed Aug. 28, 2009)

(Opinion _____, 5 Cir., _____, _____, F.3d _____)

Before DAVIS, GARZA, and PRADO, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

REHG6A

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
APR 30 2010
OFFICE OF THE CLERK

No. 09-7073

In The
Supreme Court of the United States

CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) requires a 5-year minimum sentence for possessing a firearm in furtherance of a drug-trafficking crime – "[e]xcept to the extent that a greater minimum sentence is otherwise provided by . . . any other provision of law." Did the U.S. Court of Appeals for the Fifth Circuit correctly hold, despite this "except" clause, that a defendant is subject to the 5-year minimum sentence for the firearm possession even though another provision of law requires a greater minimum sentence for another count of conviction?

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is available at 329 F. App'x 569. J.A. 15; Pet. App. 1a. The Fifth Circuit's order denying rehearing *en banc* is unreported. J.A. 18; Pet. App. 3a.

JURISDICTION

The Fifth Circuit issued its opinion on July 29, 2009. J.A. 15; Pet. App. 1a. The Fifth Circuit's order denying rehearing *en banc* was issued on August 28, 2009. J.A. 18; Pet. App. 3a. The petition for a writ of certiorari was filed on October 16, 2009. On January 25, 2010, this Court granted the petition and consolidated this case with *Abbott v. United States*, No. 09-479. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 18 U.S.C. § 924(c), the text of which is set out in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner Carlos Rashad Gould pleaded guilty and admitted to the elements of an indictment's Count One under 21 U.S.C. § 846 and Count Three

under 18 U.S.C. § 924(c)(1)(A). J.A. 10-14. Count One concerns conspiracy to possess with intent to distribute a controlled substance. Based upon the quantity of drugs attributed to Petitioner, 21 U.S.C. § 841(b)(1)(A) requires a minimum sentence of 10 years for Count One, a drug-trafficking crime. Count Three concerns Petitioner's possession of a firearm in furtherance of that drug-trafficking crime. Section 924(c)(1)(A) requires a minimum sentence of 5 years for Count Three, a firearm crime – "[e]xcept to the extent that a greater minimum sentence is otherwise provided . . . by any other provision of law." 18 U.S.C. § 924(c)(1)(A).

At sentencing, Petitioner cited the decision by the U.S. Court of Appeals for the Second Circuit in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), and objected that, because of section 924(c)(1)(A)'s "except" clause and the 10-year minimum sentence required for the predicate drug-trafficking crime pursuant to 21 U.S.C. § 841(b)(1)(A), the firearm crime is not subject to the 5-year minimum sentence under 18 U.S.C. § 924(c)(1)(A)(i). The District Court overruled this objection.

The District Court sentenced Petitioner to 137 months (11 years, 5 months) for the drug-trafficking crime and to an additional 60 months (5 years) for the firearm crime. This produced a total term of imprisonment of 197 months (16 years, 4 months). Petitioner reurged his objection that the firearm crime is not subject to the 5-year minimum sentence because "a greater minimum sentence is otherwise provided

by [an]other provision of law," that is, the provision of law requiring a 10-year minimum sentence for the predicate drug-trafficking crime, 21 U.S.C. § 841(b)(1)(A). The District Court overruled the objection and entered judgment on the sentence.

On appeal, relying on the unpublished decision in *United States v. Collins*, 205 F. App'x 196 (5th Cir. 2006), as adopted by *United States v. London*, 568 F.3d 553 (5th Cir. 2009), the Fifth Circuit rejected Petitioner's argument that the firearm crime is not subject to the 5-year minimum sentence. J.A. 15-17; Pet. App. 1a-2a. *First*, the Fifth Circuit reasoned that the "except" clause's phrase "any other provision of law" simply provides a safety valve reserving the possibility that another law, enacted by a future Congress, might require a greater minimum sentence for violating section 924(c). *See* J.A. 15-17; Pet. App. 1a-2a; *Collins*, 205 F. App'x at 197-98. *Second*, the Fifth Circuit reasoned that the Second Circuit's and Petitioner's interpretation of the "except" clause was illogical because it would cause some defendants to be punished more leniently than less culpable defendants. *See* J.A. 15-17; Pet. App. 1a-2a; *Collins*, 205 F. App'x at 197-98. *Third*, the Fifth Circuit reasoned that, because section 924(c)(1)(A) as a whole concerns possessing a firearm in furtherance of a drug-trafficking or violent crime, it is reasonable to limit the phrase "any other provision of law" to legal provisions outside of section 924(c) that concern the same thing. *See* J.A. 15-17; Pet. App. 1a-2a; *see Collins*, 205 F. App'x at 198. The Fifth Circuit therefore

affirmed Petitioner's sentence. J.A. 16-17; Pet. App. 2a.

SUMMARY OF THE ARGUMENT

This case concerns the proper interpretation and application of 18 U.S.C. § 924(c)(1)(A)'s "except" clause for sentences involving drug trafficking and firearm possession. Section 924(c)(1)(A) requires a 5-year mandatory minimum sentence for possessing a firearm in furtherance of a drug-trafficking crime – "[e]xcept to the extent that a greater minimum sentence is otherwise provided by . . . any other provision of law." The District Court, affirmed by the Fifth Circuit, erred by imposing this 5-year sentence on Petitioner for possessing a firearm in furtherance of a drug-trafficking crime because another provision of law (21 U.S.C. § 841(b)(1)(A)) requires a greater, 10-year minimum sentence for the drug-trafficking offense.

The plain language of section 924(c)(1)(A)'s "except" clause forbids an additional sentence for the firearm crime under these circumstances. As this Court recently held in *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009), the phrase "any other provision of law" has a plain and expansive meaning that gives no warrant to limit the class of laws to which it refers. The "except" clause therefore exempts a defendant from section 924(c)(1)(A)'s 5-year sentence for possessing a firearm in furtherance of a drug-trafficking

crime where any law for any type of crime requires a district court to impose a greater minimum sentence on the defendant for any count of conviction.

The purpose and context of section 924(c)(1)(A) support this straightforward statutory command. They demonstrate that Congress included the "except" clause in section 924(c)(1)(A), as amended in 1998, as a measure to moderate the expansion of the statute's application and to assure that defendants who possess a firearm in furtherance of a drug-trafficking or violent crime will serve at least 5 years in prison. Petitioner's reading of section 924(c)(1)(A)'s plain meaning accords with and furthers that purpose.

Both the Fifth Circuit and the government misunderstand and misconstrue the "except" clause. Attempting to narrow the expansive scope of the language that Congress chose to enact, they interpret the phrase "any other provision of law" to mean only "any provision of law *outside of section 924(c)* that provides a greater minimum sentence *for violating section 924(c)(1)(A)*." This interpretation, however, requires improperly reading the language "for violating section 924(c)(1)(A)" into the enacted text of the "except" clause. To justify and explain this departure from the "except" clause's actual text, the Fifth Circuit and the government strangely assert that Congress included the phrase "any other provision of law" as a so-called "safety valve" to account for any new, greater minimum sentences in the future that are provided outside of section 924(c) for violating section

924(c)(1)(A) – apparently on the assumption that Congress presupposed its own inability to write a statute or amend section 924(c)(1) in a manner that would specifically account for any such sentencing provisions. It is implausible, however, that Congress would so haphazardly use a phrase as expansive as "any other provision of law" to account only for provisions of law outside of section 924(c) that provide greater minimum sentences for violating 924(c)(1)(A).

Faced with this implausibility, the Fifth Circuit and the government have turned to misplaced canons of construction and fanciful hypotheticals to support a reading of the "except" clause that Congress neither wrote nor intended. The Fifth Circuit's and the government's interpretation, which ignores and distorts the statute's plain language, is incorrect because there is no escaping that the "except" clause – as Congress actually enacted it – means what its plain language says.

Finally, even if this Court were to harbor some doubt as to the "except" clause's meaning in light of the Fifth Circuit's and the government's arguments, the rule of lenity would require the Court to adopt Petitioner's interpretation.

ARGUMENT

I. THE PLAIN LANGUAGE OF 18 U.S.C. § 924(c)(1)(A)'S "EXCEPT" CLAUSE FORBIDS AN ADDITIONAL SENTENCE FOR FIREARM POSSESSION WHERE ANY COUNT OF CONVICTION REQUIRES A MINIMUM SENTENCE GREATER THAN THAT PRESCRIBED IN SECTION 924(c)(1)(A).

This is a statutory construction case. The analysis therefore "begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). "In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal quotation marks omitted). Courts may depart from a statute's plain meaning only if adhering to it "would produce an absurd and unjust result which Congress could not have intended," that is, one that is supported by "no plausible reason." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (internal quotation marks omitted).

The statute at issue here, 18 U.S.C. § 924(c)(1)(A), criminalizes possessing a firearm in furtherance of a drug-trafficking or violent crime and assures that a defendant who does so will receive at least 5 years' imprisonment, and even more if the firearm was either brandished or discharged. 18 U.S.C. § 924(c)(1)(A). Section 924(c)(1)(A) accomplishes this by providing

that a defendant convicted of this firearm crime will receive a 5-year sentence "in addition to" any sentence for the drug-trafficking or violent crime – "except" when section 924(c) or "any other provision of law" already requires the district court to impose "a greater minimum sentence" for any count of conviction. *Id.* That is the plain meaning of section 924(c)(1)(A) and its introductory "except" clause, which was added by amendments to the statute in 1998 (Pub. L. No. 105-386, 112 Stat. 3469 (1998)):

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Id.

Stated differently, the "except" clause modifies the operative phrase "shall . . . be sentenced to a term of imprisonment," which authorizes the penalties for violating section 924(c)(1)(A). *Id.* The clause thus carves out an exception to the general requirement that defendants be sentenced to an additional, consecutive term of at least 5 years' imprisonment for possessing a firearm in furtherance of a drug-trafficking or violent crime. Under section 924(c)(1)(A), a defendant "shall . . . be sentenced to a term of imprisonment of not less than 5 years" for possessing the firearm – which must be imposed on top of any sentence "provided for [the predicate] crime of violence or drug trafficking crime" – "except" when section 924(c) (that is, "this subsection") or "any other provision of law" requires a greater minimum sentence for any count of conviction. *Id.* This assures that the defendant will serve at least 5 years in prison, as Congress intended. Here, Petitioner's predicate drug-trafficking count of conviction provides a greater, 10-year minimum sentence, triggering the "except" clause and mandating that the District Court not impose an additional, section 924(c)(1)(A) sentence.

A. The Plain Language Of Section 924(c)(1)(A) Compels The Conclusion That "Any Other Provision Of Law" Was Intended To Apply Broadly To Statutes Requiring Mandatory Minimum Sentences For Any Count Of Conviction.

Here, "any other provision of law" is the pertinent trigger for applying the "except" clause. Petitioner is not subject to a section 924(c)(1)(A) sentence for possessing a firearm where "any other provision of law" under which he was sentenced provides a greater minimum sentence. This raises the question whether "any other provision of law" means what it says, encompassing all provisions of law affecting the sentence that the district court will impose, or should be narrowly limited to some unspecified subset or class of provisions. *See Gonzales*, 520 U.S. at 5 ("The question we face is whether the phrase 'any other term of imprisonment' 'means what it says, or whether it should be limited to some subset' of prison sentences." (internal citations omitted)).

This Court recently encountered the same question in *Republic of Iraq v. Beaty*, 129 S. Ct. 2183 (2009), which involved the interpretation of the Emergency Wartime Supplemental Appropriations Act. Under that Act, the President had authority to except Iraq from certain laws, including "section 620A of the Foreign Assistance Act of 1961 or *any other provision of law* that applies to countries that have supported terrorism." *Beaty*, 129 S. Ct. at 2189

(emphasis added) (internal citations omitted). At issue in *Beaty* was whether the phrase "any other provision of law" included 28 U.S.C. § 1605(a)(7)'s exception to sovereign immunity for state sponsors of terrorism. *Id.* The Court concluded that it did, holding that "the word 'any' (in the phrase 'any other provision of law') has an 'expansive' meaning, giving us no warrant to limit the class of provisions." *Id.* (internal citations omitted).

That holding relied on this Court's interpretation in *Gonzales* of the word "any," as used in section 924(c)(1)'s phrase "any other term of imprisonment." *See id.* (citing *Gonzales*, 520 U.S. at 4-5). Under section 924(c)(1), a sentence required for possessing a firearm in furtherance of a drug-trafficking or violent crime may not run concurrently with "any other term of imprisonment." 18 U.S.C. § 924(c)(1)(D)(ii). At issue in *Gonzales* was whether "any other term of imprisonment" includes a state prison term or should be limited to a class of prison terms – namely, federal prison terms. *Gonzales*, 520 U.S. at 5.

"Read naturally," the Court explained in *Gonzales*, the word "any" means "one or some indiscriminately of whatever kind." *Id.* at 5 (quoting Webster's Third New International Dictionary 97 (1976)). What is more, "Congress did not add any language limiting the breadth of that word" in the phrase "any other term of imprisonment." *Id.* Thus, the Court held, the phrase "any other term of imprisonment" means all terms of imprisonment, not only federal prison terms. *Id.*

The same reasoning applies here to the "except" clause, which Congress enacted the very next year after this Court's decision in *Gonzalez*. Congress did not add language in section 924(c)(1)(A) that would limit the breadth of "any" in the "except" clause's phrase "any other provision of law." Section 924(c)(1)(A)'s phrase "any other provision of law" means what it says and is as broad as its plain language suggests.

As demonstrated elsewhere in section 924(c)(1)(A), Congress knows how to limit the breadth of "any" when it wants to. In the same sentence in section 924(c)(1)(A) in which the phrase "any other provision of law" appears, Congress limited the phrase "any crime of violence or drug trafficking crime" to "any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A). That no restriction similarly modifies the "except" clause's phrase "any other provision of law" demonstrates that no restriction was intended. *See Gonzales*, 520 U.S. at 5 ("find[ing] it significant" that two sentences before Congress used the unlimited phrase "any other term of imprisonment," Congress used the limited "phrase 'any crime of violence or drug trafficking crime . . . for which [a defendant] may be prosecuted in a court of the United States'").

The words "any" and "other" and the phrase "provision of law" are clear, and that clarity does not disappear upon combining them into a single phrase in section 924(c)(1)(A)'s "except" clause. The phrase "any other provision of law" refers to all provisions of law,

as it did in *Beaty*, and not to some subset or class of provisions concerning particular offense types. As the Sixth Circuit recently explained, there is no qualification of this "prohibition against greater mandatory minimums." *United States v. Almany*, 598 F.3d 238, 242 (6th Cir. 2010). "Instead, the except clause encompasses greater mandatory minimum sentences from both [section 924(c)] and 'any other provision of law.'" *Id.* It therefore encompasses the greater, 10-year minimum sentence provided for Petitioner's predicate drug-trafficking offense pursuant to 21 U.S.C. § 841(b)(1)(A).

B. The Most Natural Reading Of The "Except" Clause's Plain Language Encompasses Any Law Under Which The Defendant Will Be Sentenced For Any Count Of Conviction.

The "except" clause speaks in the present tense of a greater mandatory minimum sentence that "is" provided "by any other provision of law." 18 U.S.C. § 924(c)(1)(A). Other than the offense-defining provisions in section 924(c)(1)(A)'s clauses modifying the subject "any person" ("any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm. . . ."), section 924(c)(1)(A)'s text and structure focus entirely on setting the statutory minimum prison sentence, if any, that a district court must impose for violating section 924(c)(1)(A). And the "except" clause plainly

modifies only section 924(c)(1)(A)'s penalty provisions, not its offense-defining provisions.

Consistent with this, the "except" clause will be triggered by a greater mandatory minimum sentence required for any of a defendant's counts of convictions at sentencing, which is the time and place at which section 924(c)(1)(A)'s penalty provisions (including the "except" clause) are employed. These triggering sentences include, but are not limited to, "a greater minimum sentence" for any drug-trafficking or violent crime on which the section 924(c)(1)(A) count is predicated (as in Petitioner's case) or any offense involving the same firearm as the section 924(c)(1)(A) count. Each is, plainly, "a greater minimum sentence" that "is otherwise provided" for the particular defendant by "any other provision of law" – that is, any statutory provision other than "this subsection" (section 924(c)). *Id.*

In contrast, the "except" clause is not written in the past or future tense to refer to a greater mandatory minimum sentence that was previously imposed or could be imposed in the future. This exception, therefore, is not triggered by a greater mandatory minimum sentence for a past conviction or for a pending count of which the defendant has not been and may never be convicted.

Simply put, the "except" clause, based on the most natural reading of its plain language, prohibits an additional sentence for possessing a firearm in furtherance of a drug-trafficking crime if one of the

defendant's counts of convictions at sentencing – in this case, Petitioner's count of conviction under 21 U.S.C. § 846 – requires that the district court impose a greater minimum sentence.

II. THE STATUTE'S PURPOSE AND CONTEXT CONFIRM THIS UNDERSTANDING OF SECTION 924(C)(1)(A)'S PLAIN LANGUAGE.

The meaning of section 924(c)(1)(A) is plain. It applies, by its own terms, only to a defendant who has committed a drug-trafficking or violent crime, and it speaks prospectively of minimum sentences, if any, to be imposed based on the concomitant use, carrying, or possession of a firearm in addition and consecutive to any sentence for the predicate drug-trafficking or violent crime. Section 924(c)(1)(A)'s "except" clause is equally plain in that it is triggered by a greater mandatory sentence that is provided by, and will be imposed on the defendant by the district court pursuant to, "any other provision of law," without limitation. There is no intimation that Congress intended otherwise. *See Gonzales*, 520 U.S. at 9 ("The statute speaks of 'any term of imprisonment' without limitation, and there is no intimation that Congress meant § 924(c) sentences to run consecutively only to certain types of prison terms.").

"Given the straightforward statutory command, there is no reason to resort to legislative history," *id.* at 6, and there is "no room to speculate about

congressional intent," *id.* at 9; *accord Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) (holding that where "the statutory language is clear, there is no need to reach . . . arguments based on statutory purpose, legislative history, or the rule of lenity"). Section 924(c)(1)(A)'s purpose and context, however, confirm the statutory text's command.

In 1998, Congress amended section 924(c)(1) to its current version primarily in response to *Bailey v. United States*, 516 U.S. 137 (1995), in which this Court held that "use" of a firearm does not include "possession" of a firearm. *United States v. Whitley*, 529 F.3d 150, 154-55 (2d Cir. 2008). The amendments criminalized possession in furtherance of a drug-trafficking or violent crime while also adding graduated mandatory minimum sentences for brandishing and discharging a firearm and for subsequent convictions under section 924(c). *Id.* At the same time, the amendments added the "except" clause to section 924(c)(1)(A). *Id.* at 153-54 n.2.

While these 1998 amendments suggest that Congress generally intended to extend section 924(c)'s application following this Court's decision in *Bailey*, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). In fact, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.*

Here, section 924(c)(1)(A)'s text and context demonstrate that, in extending section 924(c)'s application, Congress did not intend to act without restraint. The 1998 amendments reflect that Congress wanted to ensure that a defendant who commits a drug-trafficking or violent crime using, carrying, or possessing a firearm will spend at least 5 years in prison. *Accord Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 3 (1997) (statement of Sen. Helms) ("If you possess a gun in any way to further your violent criminal behavior, you get a minimum of five years in the slammer. . . ."). The statutory text that Congress enacted – which is the best evidence of the statute's purpose – also reflects that Congress reasonably believed that this purpose is served if that defendant is subject to a mandatory minimum sentence of more than 5 years for, as in Petitioner's case, the drug-trafficking crime. *See generally W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of th[e] purpose [of a statute] is the statutory text adopted by both Houses of Congress and submitted to the President."). As the Second Circuit explained:

> Although we have no doubt that a congressional purpose was to enhance firearm penalties, we do not regard it as inconsistent with that purpose for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences, some of which were increased by the 1998 amended version,

> only the higher minimum should apply. Indeed, such a sentencing pattern seems eminently sound.

Whitley, 529 F.3d at 155 (footnote omitted).

By its plain terms, the "except" clause added to section 924(c)(1)(A) in 1998 moderated Congress's extension of section 924(c)'s application by directing courts not to add a sentence for possessing a firearm in furtherance of a drug-trafficking crime if, because of "any other provision of law," a defendant is already guaranteed to be sentenced to serve more than 5 years in prison. This is the most reasonable explanation for why Congress added an exception triggered not only by section 924(c) but also by "any other provision of law" at the same time that it extended section 924(c).

III. THE GOVERNMENT AND THE FIFTH CIRCUIT MISUNDERSTAND AND MISCONSTRUE THE "EXCEPT" CLAUSE.

In the face of the most natural reading of section 924(c)(1)(A)'s plain language and this Court's broad interpretation of the statutory phrase "any other provision of law" in *Beaty*, the government and the Fifth Circuit narrowly interpret the phrase "any other provision of law" to mean only those laws outside of section 924(c) that would require a greater minimum sentence *for violating section 924(c)(1)(A)*. *See* Petition for a Writ of Certiorari at 11-12, *United States v. Williams*, No. 09-466 (Oct. 20, 2009); *Collins*,

205 F. App'x at 197-98; *accord* J.A. 15-17 (relying on the "reasoning and holding of *Collins*," adopted in full by *United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009), to reject Petitioner's argument under section 924(c)). Under this interpretation, as applied here, "any other provision of law" would trigger the "except" clause and preclude the imposition of section 924(c)(1)(A)'s 5-year minimum sentence *only* if that other provision required a greater minimum sentence *for the section 924(c)(1)(A) offense itself*. This unduly narrow interpretation, which ignores and distorts the statute's expansive plain language, is incorrect.

A. The Government's And The Fifth Circuit's Interpretation Improperly Reads Language Into The Statute To Narrow The Scope Of Its Expansive Language On An Assumption Of Congressional Incompetence.

The government's and the Fifth Circuit's interpretation of "any other provision of law" improperly reads language into the "except" clause to give it a narrower construction than is called for by the broad, unlimited language that Congress enacted. In particular, their interpretation reads in the phrase "for violating section 924(c)(1)(A)," as if the "except" clause provides: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any provision of law *outside of section 924(c) for violating section 924(c)(1)(A)*. . . ." "This added requirement, however, is in no way anchored in

the text of the statute." *See Gonzales*, 520 U.S. at 6 (internal citation and quotation marks omitted). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, "[t]o supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

Had Congress intended the government's narrow construction, "it could have so indicated." *Smith v. United States*, 508 U.S. 223, 229 (1993). The language that Congress actually enacted is most naturally read – without reading any language in – to refer to "any other provision of law" under which the defendant will be sentenced for any count of conviction. Nothing in section 924(c)(1)(A)'s language supports a more restrictive reading of "any other provision of law" to mean only provisions outside of section 924(c) providing penalties for violating section 924(c)(1)(A) or, for that matter, an offense involving the same firearm as the section 924(c)(1)(A) violation.

To justify an interpretation that reads language into the statute to narrow its scope, the government has argued, and the Fifth Circuit held, that the phrase "any other provision of law" acts as a placeholder or "safety valve" in case some future Congress decides to enact a greater statutory mandatory minimum sentence outside of section 924(c) for violating section 924(c)(1)(A). Pet. at 12-13, *Williams*, No. 09-466; *Collins*, 205 F. App'x at 197-98. That is, according

to the government and the Fifth Circuit, by including the phrase "or by any other provision of law" in the "except" clause, Congress was legislating for the possibility of future legislation. Left unanswered by the Fifth Circuit and the government is why Congress would presuppose its own inability to write a statute that would address this issue by, for example, amending section 924(c)(1)(A) to refer specifically to any new statutory provision requiring a greater minimum sentence for a section 924(c)(1)(A) violation.

Indeed, a "safety valve" is only necessary to prevent accidents or to address unforeseeable circumstances. It is implausible that Congress included the phrase "any other provision of law," in addition to the phrase "this subsection" (referring to section 924(c)), for the limited purpose of protecting against the chance that future, new legislation, which enacts provisions somewhere outside of section 924(c) itself, might come into existence and inadvertently create greater minimum sentences for violating section 924(c)(1)(A). That possibility is, in any event, not something that Congress could fail to foresee or control. To the contrary, because Congress alone may enact federal criminal legislation, any legislation that provides a greater statutory minimum sentence for violating section 924(c)(1)(A) would not pass unbeknownst to it. Congress would know any legislation's effect on section 924(c)(1)(A) and can be expected to (and can expect itself to) account for that effect at the time of the legislation's enactment, rather than preemptively.

This Court itself recently doubted that Congress would have statutory triggers apply "in so limited and so haphazard a manner." *Nijhawan v. Holder*, 129 S. Ct. 2294, 2302 (2009). In *Nijhawan*, the Court addressed a statute providing that any alien convicted of an "aggravated felony" may be deported. *Id.* at 2297. The "aggravated felony" at issue was "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *Id.* The defendant interpreted this language to mean that fraud or deceit constitutes an "aggravated felony" only when a monetary threshold of $10,000 or more is an element of the offense. *See id.* Although the defendant identified three federal statutes with relevant monetary thresholds, those statutes specify thresholds not of $10,000, but of $100,000 or $1,000,000. *Id.* at 2301-02.

Rejecting this interpretation, this Court questioned why Congress would draft a statutory trigger with those three statutes in mind but then specify a monetary threshold – $10,000 – that "would apply to other, nonexistent statutes as well." *Id.* at 2302. That is, the Court refused to believe that Congress would enact such broad language if it had a narrow set of statutes in mind. *See id.* at 2301-02 (noting that the defendant's interpretation would have left the statute "with little, if any, meaningful application"); *accord United States v. Hayes*, 129 S. Ct. 1079, 1087-88 (2009) ("Given the paucity of state and federal statutes targeting *domestic* violence, we find it highly improbable that Congress meant to extend § 922(g)(9)'s

firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense."). Otherwise, as the government argued in *Nijhawan*, it "would effectively mean that Congress had used an elephant-sized hole to house a mouse." Brief of Respondent at 30, *Nijhawan v. Holder*, No. 08-495 (Mar. 25, 2009).

The government and the Fifth Circuit are therefore wrong to interpret "any other provision of law" as limited to greater mandatory minimum sentences that may be provided outside of section 924(c) for violating section 924(c)(1)(A). Rather, as in *Beaty*, "any other provision of law" means all provisions of law, not some subset or class of laws. *See Beaty*, 129 S. Ct. at 2189. Because Congress did not limit "any other provision of law" to "any other provision of law for violating section 924(c)(1)(A)," neither may this Court. *Smith*, 508 U.S. at 229 (holding that because Congress did not indicate that it intended a narrow construction, "we decline to introduce that additional requirement on our own").

However, even if the Court were inclined to adopt some sort of narrowed construction of the phrase "any other provision of law," the Court should not accept the government's invitation to narrow it as though it reads "any provision of law outside of section 924(c) that would require a greater minimum sentence for violating section 924(c)(1)(A)." Rather, section 924(c)(1)(A) as a whole, in context, would better yield the conclusion that "any other provision of law"

at the very least refers to statutes providing a mandatory minimum sentence for the predicate drug-trafficking or violent crime itself. The latter portion of section 924(c)(1)(A) makes plain that its mandatory minimum sentences are to be imposed "in addition to the punishment provided for [the predicate] crime of violence or drug trafficking crime" – "except to the extent that a greater minimum sentence is otherwise provided by" a "provision of law" "other" than section 924(c). 18 U.S.C. § 924(c)(1)(A). These "except" and "in addition to" clauses, which appear in the same sentence, both refer to penalties provided by statutory provisions outside of section 924(c) itself. In context, then, the phrase "any other provision of law" must encompass more than provisions outside of section 924(c) for violating section 924(c)(1)(A); it must at least encompass "the punishment provided for such crime of violence or drug trafficking crime" by provisions of law "other" than section 924(c). *Id.* Under that alternative, narrowed construction, the greater, 10-year minimum sentence provided for Petitioner's predicate drug-trafficking offense is itself "a greater minimum sentence [that] is otherwise provided . . . by any other provision of law," *id.*, and his 5-year section 924(c)(1)(A) sentence would have to be vacated.

B. The Government And The Fifth Circuit Have Mistakenly Relied On The Inapplicable Canon Of *Noscitur A Sociis*.

The government and the Fifth Circuit have likewise improperly relied on the canon of "*noscitur a sociis*, according to which a word is known by the company it keeps." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008) (internal citation and quotation marks omitted). The government has argued that, "[j]ust as the phrase 'this subsection' refers to provisions that prescribe minimum sentences for the Section 924(c) offense, so too the phrase 'any other provision of law' should be read to refer to those provisions elsewhere in the United States Code that establish penalties for violating Section 924(c)(1)(A)." Pet. at 12-13, *Williams*, No. 09-466. The Fifth Circuit, for its part, held that, because section 924(c)(1)(A) concerns firearm possession in furtherance of a drug-trafficking or violent crime, the plainly broad phrase "by any other provision of law" should be limited to legal provisions outside of section 924(c) (that is, "this subsection") that concern the same thing. *Collins*, 205 F. App'x at 198.

However, "that a word may be known by the company it keeps is . . . not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923); *see also Graham County Soil & Water Conservation Dist. v. United States*, ___ S. Ct. ___, 2010 WL 1189557, at

*4-5 (Mar. 30, 2010) (rejecting the argument that "the placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations"). For example, in *Ali*, this Court construed the phrase "any officer of customs or excise or any other law enforcement officer." *Ali*, 552 U.S. at 215-16 (internal quotation marks omitted). The Court rejected the application of *noscitur a sociis*, holding that the language "any other law enforcement officer" was "all-encompassing" and not limited to "any other law enforcement officer acting in a customs or excise capacity." *Id.* at 227 (internal quotation marks omitted). According to the Court, the statute's emphasis on "customs and excise is not inconsistent with the conclusion that 'any other law enforcement officer' sweeps as broadly as its language suggests." *Id.* at 226.

Similarly, nothing in section 924(c)(1)(A) requires this Court to assimilate the phrase "provided by . . . any other provision of law" with the phrase "provided by this subsection" simply because the latter has a necessarily narrow application. *Cf. Russell Motor Car Co.*, 261 U.S. at 519. Just as this Court had no reason in *Ali* to limit "any other law enforcement officer" to "any other law enforcement officer acting in a customs or excise capacity," the Court has no reason in this case to limit "any other provision of law" to "any other provision of law providing a greater minimum sentence for violating section 924(c)(1)(A)." While the

"except" clause already encompasses greater minimum sentences for a section 924(c) offense through its phrase "by this subsection," the phrase "by any other provision of law," by its terms, sweeps more broadly than merely sentences for section 924(c)(1)(A) offenses themselves. And it does so with good reason, entirely consistently with the limited scope of the phrase "by this subsection," where section 924(c)(1)(A) is designed to ensure that a defendant who possesses firearms in furtherance of a drug-trafficking or violent crime will serve at least 5 years in prison. That purpose is accomplished by any mandatory minimum sentence of greater than 5 years imposed for *any* count of conviction on which a defendant is sentenced.

The canon of *noscitur a sociis* is, in any event, misplaced here for at least additional reasons. *First*, a list of two items "is too short to be particularly illuminating." *Graham County Soil & Water Conservation Dist.*, 2010 WL 1189557, at *5; *see also S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006) ("The argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one. . . ."). *Second*, the canon of *noscitur a sociis* does not provide a license to write restrictions into section 924(c)(1)(A)'s text that Congress did not enact. This Court applies the canon only to clarify words that "are of obscure or doubtful meaning." *Russell Motor Car Co.*, 261 U.S. at 520. The "except" clause's consecutive phrases "by this subsection" and "by any other provision of law,"

however, are in no way ambiguous. *Accord United States v. Stevens*, ___ S. Ct. ___, 2010 WL 1540082, at *9 (Apr. 20, 2010) (declining to apply the canon of *noscitur a sociis* in part because words "should be read according to their ordinary meaning" and "the phrase 'wounded . . . or killed' at issue [in the case] contain[ed] little ambiguity"). As explained above, each phrase is clear, and each phrase has its own character that should not "be submerged by its association" with the other. *Russell Motor Car Co.*, 261 U.S. at 519; *see also Graham County Soil & Water Conservation Dist.*, 2010 WL 1189557, at *5.

C. The Government And The Fifth Circuit – Ignoring Both The Sentencing Guidelines And A District Court's Discretion To Impose Greater Than Mandatory Minimum Sentences – Have Wrongly Hypothesized That Interpreting The "Except" Clause According To Its Plain Language Would Lead To "Illogical" Results.

The government and the Fifth Circuit have hypothesized that interpreting the "except" clause to mean what it says would lead to "illogical results." Pet. at 16-17, *Williams*, No. 09-466; *Collins*, 205 F. App'x at 197-98. According to the government and the Fifth Circuit, if Petitioner's interpretation of the plain language of the "except" clause were correct, less culpable defendants would receive greater sentences

than more culpable defendants under a certain set of circumstances:

> Consider, for example, two defendants possessing cocaine – the first possessing 500 grams and subject to a mandatory minimum sentence of five years under 21 U.S.C. 841(b)(1)(B), and the second possessing five kilograms (ten times the amount) and subject to a mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). If the first defendant brandishes a firearm in furtherance of his drug offense, under the decision below the "except" clause would not apply and the defendant would be subject to two mandatory minimum sentences totaling 12 years: the five-year sentence under 21 U.S.C. 841(b)(1)(B) and a consecutive mandatory minimum sentence of seven years under Section 924(c)(1)(A)(ii). But if the second defendant brandishes a firearm in furtherance of his much more serious drug offense, under the Second Circuit's view the except clause would apply, the seven-year mandatory minimum in Section 924(c)(1)(A)(ii) therefore would disappear, and the defendant would be subject to a single mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). Thus, the more serious offender would face a lesser minimum sentence.

Pet. at 16-17, *Williams*, No. 09-466; *see also Collins*, 205 F. App'x at 197-98.

But this hypothetical ignores that, applying the Sentencing Guidelines, district courts can tailor

sentences for every drug-trafficking crime to ensure that defendants receive sufficient punishment for their conduct. The Guidelines provide a two-level enhancement for possessing a dangerous weapon, "including a firearm," in connection with a drug-trafficking crime. U.S. Sentencing Guidelines § 2D1.1(b)(1) (2009); *see also, e.g.*, *id.* §§ 2B3.1(b)(2)(A), 2B3.2(b)(3)(A)(i) (providing similar enhancements for certain violent crimes). This enhancement applies as long as a defendant is not subject to a section 924(c)(1)(A) sentence for possessing, brandishing, or discharging the firearm. *E.g.*, *id.* § 2K2.4 cmt. n.4. The Guidelines further provide that "[i]f a weapon or dangerous instrumentality was used or possessed in the commission of [an] offense the court may increase the sentence above the authorized guideline range" and that the "discharge of a firearm might warrant a substantial sentence increase." *Id.* § 5K2.6. Thus, a district court sentencing the defendants depicted in the hypothetical would have an array of tools to account adequately and appropriately in a particular case for firearm possession in imposing a sentence.

The same pertinent Guidelines existed in 1998 when Congress amended section 924(c) to include the "except" clause. *E.g.*, U.S. Sentencing Guidelines §§ 2D1.1(b)(1), 5K2.6 (1998); U.S. Sentencing Guidelines §§ 2D1.1(b)(1), 5K2.6 (1997). Because that 1998 amendment predated this Court's 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), Congress would have known when adding the "except" clause that, if no sentence would be imposed for

violating section 924(c)(1)(A), a district court was *required* to account for the criminalized firearm possession in sentencing the defendant for the drug-trafficking crime alone. A district court therefore had the ability before *Booker* – and certainly has the discretion after it – to fashion a sufficiently stringent sentence that will ensure that the firearm possession is not rendered immaterial or insignificant.

Critically, section 924(c)(1)(A)'s "except" clause has no effect on the statutory maximum applicable to the count of conviction for which "a greater minimum sentence" is provided. The government's hypothetical falls short of proving its point because it simply compares the *minimum* sentence that two defendants might face, not a determinate or maximum term to which each can be sentenced.

The Second Circuit captured this idea in debunking the government's objections to reading the "except" clause literally based on this hypothetical. The Court of Appeals explained that the supposed

> anomaly "disappears upon close scrutiny" because "no court would be *required* to sentence the five-kilogram defendant to only the ten-year minimum. That defendant would face a maximum sentence of life. . . . If the 'except' clause subjected more serious drug offenders to a lower *maximum* sentence than less serious drug offenders, the Government's anomaly argument would have some force." Thus, a literal reading of the statute does not render it incoherent. . . . "[T]he

> literal wording leaves no defendant unsentenced. Indeed, . . . it leaves sentencing judges free to impose precisely the same number of years that the Government contends should have been imposed on [the defendant], but authorizes them to do so as a matter of discretion, not as a requirement."

United States v. Williams, 558 F.3d 166, 175 (2d Cir. 2009) (internal citations omitted), *pet. for cert. filed* (Oct. 20, 2009).

The government's proffered hypothetical therefore does not, as the government would have it, illustrate what are necessarily actual "sentencing *outcomes*" at all. Pet. at 16, *Williams*, No. 09-466 (emphasis added). The results to which the government points are not in any way "illogical," much less the "absurd and unjust result[,] which Congress could not have intended," that would be required to depart from the statute's plain meaning. *Clinton*, 524 U.S. at 429.

In fact, the results of the hypothetical are entirely consistent with the text and purpose of section 924(c)(1)(A) and its "except" clause. Both defendants identified in the government's proffered hypothetical would, as Congress intended, face a total mandatory *minimum* sentence of at least 7 years' imprisonment in connection with committing a drug-trafficking crime while brandishing a firearm.

The result in the government's hypothetical is likewise neither inconsistent with nor somehow

"illogical" in the face of the general rule that a 924(c)(1)(A) sentence must be imposed as a consecutive sentence "in addition to the punishment provided for" the predicate "crime of violence or drug trafficking crime" (including one "that provides for an enhanced punishment if committed by the use of a" firearm). The "except" clause is, by its plain text and design, an *exception* to that general rule. "The government would have the rule swallow the exception." *Williams*, 558 F.3d at 172. When the "except" clause is triggered, the defendant will not receive the lesser minimum sentence under section 924(c)(1)(A) but will be sentenced to a term of at least – in fact, more than – 5 years' imprisonment pursuant to the "greater minimum sentence" provided by section 924(c) or another provision of law.

Neither does the government's hypothetical demonstrate any inconsistency between a plain reading of the "except" clause and the operation of section 924(c)(1)(D)(ii), which dictates that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. § 924(c)(1)(D)(ii). That directive applies by its own terms only when a sentence is actually "imposed on [the defendant] under" section 924(c). *Id.* "If the 'except' clause is read literally, and another statute provides a higher minimum penalty, the minimum

punishments set forth in the subdivisions of Section 924(c)(1)(A) would never be imposed at all, and thus, there would be no concurrent sentences." *Williams*, 558 F.3d at 172.

In any event, even if the government's hypothetical did represent an imagined instance of supposedly "illogical results" or "sentencing outcomes" or "anomalies," that is not enough to relieve this Court of its "obligation . . . to apply the statute as Congress wrote it." *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470 (1997) (internal quotation marks omitted). The government's arguments simply do not establish that applying the plain text "would frustrate Congress's clear intention or yield patent absurdity." *Id.* (internal quotation marks omitted).

As this Court has explained in recently interpreting section 924(c)(1)(A), courts deal with "[f]anciful hypotheticals" on their own terms, "not by contorting and stretching the statutory language." *See Dean v. United States*, 129 S. Ct. 1849, 1854 (2009). To be sure, "[v]irtually *every* legal (or other) rule" can be argued to have "imperfect applications in particular circumstances." *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003). But that is no reason to ignore or disregard the rule as enacted by Congress. "[T]o the extent that cases can be hypothesized in which [a] holding may support curious or seemingly unreasonable comparative sentences, . . . the asserted unreasonableness flows not from . . . this decision, but from the statute[ ] as Congress wrote [it]." *Busic v. United States*, 446 U.S. 398, 405-06 (1980); *cf. Lamie v.*

United States Trustee, 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." (internal quotation marks omitted)); *United States v. Locke*, 471 U.S. 84, 95 (1985) ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.").

Thus, as this Court has repeatedly explained (including in connection with this same statute), "[i]f corrective action is needed, it is the Congress that must provide it." *Busic*, 446 U.S. at 405; *cf. Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts"). "Given [a] clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy." *Gonzales*, 520 U.S. at 10; *cf. United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820) ("We can conceive no reason why other crimes which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this Court cannot enlarge the statute.").

D. Even If The "Except" Clause Were In Any Way Ambiguous In Light Of The Government's Interpretation, The Rule Of Lenity Would Still Compel The Court To Adopt Petitioner's Interpretation.

The "except" clause plainly prohibits a section 924(c)(1)(A) sentence for possessing a firearm in furtherance of a drug-trafficking crime when another statute provides a greater minimum sentence for any count of conviction. The government's contrary interpretation of the statute is neither dictated nor justified by, for instance, its reading language into the statute's text to narrow the "except" clause's scope or its proffered hypothetical scenarios that demonstrate neither illogical sentencing outcomes nor absurd results.

But the government's resort to these arguments presents more than an attempt to evade the statute's plain language – it is also an acknowledgement, albeit an implicit one, that the government cannot prevail in the absence of effectively rewriting the statute or a finding of textual ambiguity. *See generally United States v. Monsanto*, 491 U.S. 600, 611 (1989) (canons of interpretation "are quite often useful in close cases, or when statutory language is ambiguous. But we have observed before that such interpretative canons are not a license for the judiciary to rewrite language enacted by the legislature." (internal quotation marks and brackets omitted)). This acknowledgement is fatal to the government's interpretation because, in

the context of interpreting a statue that criminalizes conduct and defines criminal penalties, abiding due process and notice concerns weigh heavily.

Even if this Court were to harbor some doubt as to the "except" clause's meaning, certainly the "Government's position is [not] unambiguously correct," *United States v. Granderson*, 511 U.S. 39, 54 (1994), and the rule of lenity therefore would operate to bar any section 924(c)(1)(A) sentence for Petitioner for possessing the firearm. The rule of lenity – requiring the Court "to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment," *Bell v. United States*, 349 U.S. 81, 83 (1955) – operates when substantial doubt over a statute's meaning remains after all other applicable canons of construction have been exhausted, *see United States v. Shabani*, 513 U.S. 10, 17 (1994). When such a doubt remains, this Court has not hesitated to apply the rule in recognition of the fundamental values that it protects:

> [The rule] is founded on two policies that have long been a part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures

> and not courts should define criminal activity.

United States v. Bass, 404 U.S. 336, 348 (1971) (internal quotation marks, citations, and footnote omitted).

In light of these policies, "[u]nder a long line of our decisions, the tie must go to the defendant." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion). "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Id.* "When interpreting a criminal statute, [this Court does] not play the part of a mind reader." *Id.* at 2026. Rather, "before one can be punished, it must be shown that his case is plainly within the statute." *McNally v. United States*, 483 U.S. 350, 360 (1987). "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *Wiltberger*, 18 U.S. (5 Wheat.) at 105 (*quoted in Santos*, 553 S. Ct. at 2026 (plurality opinion)).

Despite the "except" clause's plain text and the ill fit of the government's arguments, the Fifth Circuit nevertheless improperly chose the government's unduly narrow interpretation. Even if that interpretation were *also* reasonable, a court could only conclude that the "except" clause is at least ambiguous in that its application is not expressly foreclosed when a greater minimum sentence is provided for any count of conviction other than the section 924(c)(1)(A) offense itself – that is, insofar as what a "greater minimum sentence is otherwise provided" for is not

made more explicit. Indeed, the Fifth Circuit itself admitted that the "except" clause "is not a model of clarity." *Collins*, 205 F. App'x at 198.

The statute's legislative history does not definitively fix the statute's meaning – and certainly not in favor of the government's interpretation. During the hearings, debates, and the like leading up to section 924(c)(1)(A)'s 1998 amendments, no member of Congress apparently ever expressly discussed the "except" clause. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) ("Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). Neither do very general statements of policy and purpose behind the 1998 amendments to the statute as a whole suggest that the government's reading of the "except" clause is correct, much less unambiguously so. *See Hughey v. United States*, 495 U.S. 411, 422 (1990) ("Even were the statutory language . . . ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." (citation omitted)).

As a result, the Court should, based at the very least on the rule of lenity, reject the Fifth Circuit's and the government's interpretation of the "except" clause, adopt Petitioner's interpretation,

and, if necessary, invite Congress to speak more clearly if Congress desires to go further.

* * *

In the end, this case presents the Court with a choice between two possible interpretations of section 924(c)'s "except" clause. On the one hand, the Court can read "except to the extent that a greater minimum sentence is otherwise provided . . . by any other provision of law" as Petitioner suggests. That reading remains true to the statute's plain language and all discernable evidence of congressional intent. On the other hand, the Court can interpret the clause as the government suggests, to refer only to provisions of law that provide greater minimum sentences for violating 924(c)(1)(A). This not only assumes that Congress chose the expansive language "any other provision of law," without any further limitation, to account only for provisions concerning a particular offense, but also improperly reads language into the enacted text. Faced with such a choice, the right answer is clear, and the Court should adopt the former reading of the "except" clause and vacate Petitioner's sentence.

The Fifth Circuit affirmed the District Court's sentence of Petitioner to 5 years under section 924(c)(1)(A) for possessing a firearm in furtherance of a drug-trafficking crime, even though 21 U.S.C. § 841(b)(1)(A) provides a greater, 10-year sentence for his drug-trafficking crime. Whether based on section 924(c)(1)(A)'s plain language or on the rule of lenity,

this 10-year sentence triggered the "except" clause, precluding the District Court from imposing on Petitioner an additional sentence for the firearm crime. Petitioner's sentence, therefore, should be vacated and his case remanded for further resentencing.

CONCLUSION

For the reasons stated above, the Court should reverse the Fifth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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APPENDIX (18 U.S.C. § 924(c))

Section 924(c) of Title 18, United States Code, provides:

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person,

including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a

crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section –

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition –

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

RESPONDENT'S BRIEF

Nos. 09-479 and 09-7073

In the Supreme Court of the United States

KEVIN ABBOTT, PETITIONER

v.

UNITED STATES OF AMERICA

CARLOS RASHAD GOULD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Section 924(c) of Title 18 requires a five-year mandatory consecutive sentence for carrying, using, or possessing a firearm in connection with "any crime of violence or drug trafficking crime" "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

The question presented is whether the "except" clause exempts a defendant from any sentence for a Section 924(c) violation if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense.

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In the Supreme Court of the United States

No. 09-479

KEVIN ABBOTT, PETITIONER

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Abbott* (Abbott Pet. App. 1a-25a) is reported at 574 F.3d 203. The opinion of the district court (Abbott Pet. App. 26a-32a) is available at 2008 WL 540737. The opinion of the court of appeals in *United States* v. *Gould* (Gould Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 329 Fed. Appx. 569. An

earlier opinion of the court of appeals in *United States* v. *Gould* is reported at 529 F.2d 274.

JURISDICTION

The judgment of the court of appeals in *United States* v. *Abbott* was entered on July 28, 2009. A petition for rehearing was denied on August 31, 2009 (Abbott Pet. App. 33a-34a). The petition for a writ of certiorari was filed on October 19, 2009, and was granted on January 25, 2010. The judgment of the court of appeals in *United States* v. *Gould* was entered on July 29, 2009. A petition for rehearing was denied on August 28, 2009 (Gould Pet. App. 3a). The petition for a writ of certiorari was filed on October 16, 2009, and was granted on January 25, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 18 U.S.C. 924(c)(1), 18 U.S.C. 924(c)(1) (1994), and 18 U.S.C. 3559(c), are set forth at App., *infra*, 1a-8a.

STATEMENT

1. *No. 09-479.*

a. When executing a search warrant at a house in Philadelphia identified as the site of crack dealing, the police encountered Kevin Abbott standing in the doorway. Abbott slammed the door when the officers identified themselves. After breaking down the door, police arrested Abbott as he tried to escape through a kitchen window. Police recovered the following from Abbott: $617 in cash (including $20 in prerecorded buy money), a key to the building's front door, a bag of marijuana, and a false driver's license. A search of the building

uncovered narcotics, drug paraphernalia, and two handguns. Abbott Pet. App. 3a-4a.

A grand jury sitting in the Eastern District of Pennsylvania returned an indictment charging Abbott with conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. 846; possession with intent to distribute more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g) and 924(e). Abbott Pet. App. 4a-5a. The government filed an information under 21 U.S.C. 851 that exposed Abbott to a mandatory minimum term of ten years of imprisonment on the drug trafficking charges because of prior convictions for felony drug offenses. See 21 U.S.C. 841(b)(1)(B); 2:05-cr-00333 Docket Entry No. 45 (filed Jan. 10, 2006). Abbott's criminal history also exposed him to a 15-year mandatory minimum sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which requires such a sentence if the defendant has been convicted under 18 U.S.C. 922(g)(1) and has at least three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. 924(e)(1). A jury found Abbott guilty on all counts. Abbott Pet. App. 26a.

b. At sentencing, the government noted that Abbott faced certain statutorily mandated terms of imprisonment: ten years in prison for each of the two drug trafficking convictions, 15 years in prison under the ACCA for the Section 922(g) conviction, and five years in prison for the Section 924(c)(1)(A) conviction. 2:05-cr-00333 Docket Entry No. 147, at 3-4 (filed Dec. 6, 2007). The

government further advised the court that, under Section 924(c), the term of imprisonment Abbott received for violating that statute had to run consecutively to the term of imprisonment for the Section 922(g) conviction and that Abbott therefore faced a minimum term of 20 years in prison. *Id.* at 4 & n.1; see 18 U.S.C. 924(c)(1)(D)(ii).

Abbott opposed such a sentence, arguing that the language of Section 924(c)(1)(A) exempted him from a consecutive five-year sentence for his Section 924(c) conviction. He relied on the statute's introductory "except" clause, which provides that a defendant who violates Section 924(c) must receive a five-year sentence "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Abbott contended that the 15-year term of imprisonment for the Section 922(g) conviction was a "greater minimum sentence" provided by "any other provision of law" for purposes of the "except" clause. He therefore argued that the district court could impose a concurrent sentence for violating Section 924(c) and urged the court to impose a term of imprisonment totaling 15 years in prison: 15 years for the Section 922(g) conviction under the ACCA, a concurrent ten-year term for the two drug trafficking convictions, and a concurrent five-year term for the Section 924(c) conviction. Dist. Ct. Dkt. 152, at 1-2; 2/5/2007 Tr. 8-11.[1]

---

[1] In the district court, Abbott contended that the five-year term under Section 924(c) had to run consecutively to the mandatory ten-year term for his drug trafficking convictions, but that the resulting term of 15 years could run concurrently with the 15 years for the Section 922(g) conviction. See 2/5/2007 Tr. 8-11.

The district court sentenced Abbott to 20 years in prison. Judgment 2. The court concluded that, under the ACCA, Abbott was subject to a 15-year term of imprisonment for his Section 922(g) conviction. Abbott Pet. App. 28a-29a. The court imposed the ten-year statutory minimum on the two drug trafficking counts to run concurrently with each other and the 15 years on the ACCA sentence. Judgment 2. Finally, the court imposed a consecutive term of five years of imprisonment for the Section 924(c) conviction. *Ibid.*; Abbott Pet. App. 32a. The court rejected Abbott's interpretation of the statute's "except" clause, concluding that "[t]he plain language of [Section 924(c)] clearly and unambiguously mandates the district court to run any sentence under section 924(c) consecutive to all other sentences stemming from a crime of violence or drug trafficking in the same criminal proceeding." *Id.* at 29a.

c. The court of appeals affirmed. The court held that "the most cogent interpretation" of Section 924(c) "is that the prefatory clause refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." Abbott Pet. App. 12a. For example, the court explained, if a defendant brandishes a short-barreled rifle during a drug trafficking offense or violent crime, "[t]he prefatory clause simply makes clear that the ten-year minimum [of Section 924(c)(1)(B)(i)] applies" instead of the seven-year minimum sentence of Section 924(c)(1)(A)(ii). *Id.* at 13a. The phrase "any other provision of law," the court held, refers to provisions outside of Section 924(c) that prescribe a sentence for violating the statute, "in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922." *Ibid.*

The court rejected an interpretation of the "except" clause that would exempt a defendant from any sentence for violating Section 924(c) "when a predicate [drug trafficking offense or violent crime] carries a minimum sentence greater than the relevant minimum imposed by" Section 924(c). Abbott Pet. App. 14a. The court noted that such an interpretation would conflict with Section 924(c)'s mandate to impose the sentences prescribed in the statute "*in addition to* the punishment provided for" the predicate offense. *Ibid.* The court also concluded that such an interpretation would be inconsistent with Congress's goal in amending the statute in 1998 to "broaden the statute's reach" and would lead to anomalous results that Congress could not have intended. *Id.* at 14a-15a. The court likewise concluded that the "except" clause does not exempt a defendant from receiving a sentence for violating Section 924(c) if the firearm possession underlying that offense also gives rise to a mandatory minimum sentence under another firearm-specific statute such as the ACCA. The court thus "agree[d] with the majority of courts that the 'except' language connotes a comparison between alternative minimum sentences for a violation of [Section] 924(c), not between sentences for separate violations of [Section] 924(c) and another statute." *Id.* at 19a-20a.

2. *No. 09-7073.*

a. When executing a warrant to search petitioner Carlos Gould's house (the suspected site of cocaine distribution by Alfred Bryant), the police arrested Gould. In Gould's pockets, the police found approximately 29 grams of crack cocaine and 12 grams of powder cocaine. A search of the house uncovered ten grams of powder cocaine, 61 grams of crack cocaine, a quantity of marijuana, two firearms, multiple rounds of ammunition,

drug scales, and currency. In a car parked outside the house, police found Gould's social security card together with a military flak jacket, two nine-millimeter firearms, a sawed-off shotgun with an obliterated serial number, ammunition, and two grams of crack cocaine. Gould J.A. 11-12.

After his arrest, Gould told federal agents that he owned the house and that he used it primarily to sell crack cocaine. He said that Bryant also sold crack cocaine from the house and that Bryant had given him money to purchase firearms to protect the house. Gould stated that Bryant's role was to sell the crack cocaine and that Gould served as a security person, or "enforcer." 06-11058 Gov't C.A. Br. 4-5.

A grand jury sitting in the Northern District of Texas returned an indictment charging Gould with one count of conspiracy to possess with intent to distribute 50 grams or more of a mixture or substance containing cocaine base, in violation of 21 U.S.C. 846; one count of possession with intent to distribute 50 grams or more of a mixture or substance containing cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); two counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); two counts of possession of a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g); and one count of possession of a firearm with an obliterated serial number, in violation of 26 U.S.C. 5861(g). C.A. R.E. Tab 3. Gould pleaded guilty pursuant to an agreement to the drug conspiracy count and one count of violating Section 924(c) in connection with that offense. *Id.* Tab 6; Gould J.A. 15-16.

b. At sentencing, the district court determined that the advisory Sentencing Guidelines range for Gould's

drug trafficking conviction, which carried a mandatory minimum term of ten years in prison, see 21 U.S.C. (b)(1)(A)(iii), was 110 to 137 months. 8/20/2008 Tr. 43-44. The court imposed a sentence at the top of that range, 137 months, to be followed by a consecutive five-year term for the Section 924(c) conviction. Gould J.A. 16. Gould unsuccessfully objected to the imposition of the Section 924(c) sentence, relying on the Second Circuit's decision in *United States* v. *Whitley*, 529 F.3d 150 (2008). 08/20/2008 Tr. 39-40. In *Whitley*, the Second Circuit construed the introductory language of Section 924(c) to mean that a defendant is exempt from any sentence for a Section 924(c) conviction when he is subject to a greater mandatory minimum sentence under the ACCA. 529 F.3d at 151.

c. The court of appeals affirmed. Gould J.A. 15-17. Rejecting Gould's arguments based on the "except" clause, the court concluded that its decision was controlled by the reasoning and holding of *United States* v. *Collins*, 205 Fed. Appx. 196, 197-198 (5th Cir. 2006) (per curiam), cert. denied, 551 U.S. 1170 (2007), which the court had recently adopted in a precedential opinion, *United States* v. *London*, 568 F.3d 553 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009). See Gould J.A. 16. In *Collins*, the court agreed with decisions of other courts of appeals that "the 'exception' clause of § 924(c)(1)(A) does not permit a district court to consider a sentence below the mandatory minimum simply because a defendant's predicate conviction carries a mandatory minimum sentence greater than the mandatory minimum sentence that applies under § 924(c)." 205 Fed. Appx. at 197. Construing the "except" clause "in the context of the language and design of the statute as whole," *id.* at 198 (citation and internal

quotation marks omitted), the court concluded that it was "reasonable to read the phrase 'any other provision of law' as referring to legal provisions outside the confines of § 924(c) that concern firearm possession in furtherance of a crime of violence or drug-trafficking crime," *ibid.*

SUMMARY OF ARGUMENT

The courts of appeals correctly upheld petitioners' sentences under Section 924(c). The statute's introductory "except" clause means that a defendant who commits a Section 924(c) offense is subject to the baseline five-year mandatory minimum sentence set forth in Section 924(c)(1)(A) unless Section 924(c) itself or any provision of law imposes a greater mandatory minimum for that offense. Contrary to petitioners' various interpretations, and consistent with the conclusion of the overwhelming majority of courts of appeals, a defendant is not exempt from any sentence for a Section 924(c) offense whenever he faces a higher mandatory minimum on a different count of conviction.

I. Section 924(c)(1)(A) provides for the imposition of specified minimum sentences "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law," 18 U.S.C. 924(c)(1)(A), but it does not explicitly state what offense may give rise to such a triggering sentence. As petitioners implicitly acknowledge, the clause must "have some understood referent to be intelligible." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008) (emphasis omitted), cert. denied, 129 S. Ct. 1688 (2009). The natural referent of the "except" clause is the offense that immediately follows—using, carrying, or possessing a firearm in connection with a crime of violence or drug-

trafficking. All parties agree that the phrase "this subsection" means Section 924(c) and therefore refers to sentences for violation of that statute. Under the canon that general terms of a statute draw their meaning from neighboring words, the phrase "any other provision of law" similarly refers to sentences for violation of Section 924(c) that are contained elsewhere in the United States Code.

Petitioners contend that this reading of "any other provision of law" is incorrect because, in their view, Congress would not prescribe minimum sentences for violation of Section 924(c) in a separate statute. In fact, Congress has done exactly that in 18 U.S.C. 3559(c), which requires a mandatory minimum sentence of life imprisonment for a Section 924(c) offense committed by a defendant with a particularly serious criminal record. See 18 U.S.C. 3559(c)(1), (c)(2)(F). The drafting history of that provision provides compelling support for the decisions below: Congress amended Section 3559(c) to encompass additional Section 924(c) offenses in the same bill that added the "except" clause in 1998.

The purpose of Section 924(c) also supports the courts of appeals' interpretation of the "except" clause. The text and history of Section 924(c) make clear that Congress intended the statute to create a deterrent to employing firearms during certain crimes by providing that any defendant who does so must receive a consecutive minimum sentence in addition to any other applicable sentence. The interpretation applied in sentencing petitioners furthers that purpose because it ensures that a defendant will receive a sentence for Section 924(c) over and above any punishment for different counts of conviction, and thus that the same conduct will be punished more harshly when it involves a firearm.

II. Petitioners propose several mutually inconsistent interpretations of the "except" clause, but none is compatible with statutory text, purpose, or history. Although petitioners emphasize the breadth of the phrase "any other provision of law," they do not urge a literal reading of those words. Instead, they offer three different readings of the phrase: any provision of law that provides a minimum sentence available to the court at the time of sentencing on the Section 924(c) offense; any provision of law that is violated in the same criminal transaction giving rise to the Section 924(c) offense; or, finally, any provision of law that is violated by the possession of the same firearm at issue in the Section 924(c) offense.

None of those inventive interpretations finds support in either the statute's text or principles of statutory interpretation. Each interpretation would frustrate the purpose of Section 924(c) by entirely eliminating any sentence for a violation of that statute when a different count of conviction carries a higher mandatory minimum sentence. Under petitioners' readings, a defendant would face no sentence for violating Section 924(c) when he is also convicted under 21 U.S.C. 841(b)(1)(A) or when he qualifies as an armed career criminal under 18 U.S.C. 924(e). Because drug convictions and ACCA sentences are frequently paired with Section 924(c) convictions, petitioners' interpretations would render the statute irrelevant in a broad swath of cases.

Petitioners' interpretations create anomalies that Congress could not have intended. Under their view, a defendant convicted of a standalone substantive offense receives no sentence for that crime. Less culpable defendants would face a higher mandatory minimum sentence than more culpable offenders. And Gould's pro-

posed interpretation, which turns on whether the defendant faces a higher mandatory minimum on a different offense at the time he is sentenced for the Section 924(c) crime, would make the applicability of a sentence under Section 924(c) turn largely on the form of the government's charging instruments. Petitioners dismiss these anomalies primarily by saying that, when they arise, district courts may exercise their discretion under 18 U.S.C. 3553(a) to adjust the total sentence. But in 1998 (when the relevant language was added to Section 924(c)) Congress could not possibly have anticipated that this Court would make the Guidelines advisory. Nor is there any reason to believe that Congress decided to eliminate the Section 924(c) sentence but simultaneously invited courts to increase the sentence on the predicate offense when they disagreed with that decision, or, more generally, that Congress intended to rely on the court's discretion as an adequate substitute for the mandatory minimum scheme it prescribed in Section 924(c).

In addition, petitioner's arguments conflict with the legislative history of the "except" clause. Petitioners do not dispute that, under the pre-1998 version of Section 924(c), the mandatory sentence for violation of that provision would have applied even if the defendant faced a higher minimum sentence for another offense. Petitioners contend, however, that the 1998 amendments eliminated any sentence for violation of Section 924(c) in such circumstances. But as this Court recently explained in *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010), Congress made only two significant substantive changes to Section 924(c) in 1998, and those revisions were intended to expand the scope of the statute and increase the penalties for its violation. Neither substantive change sug-

gests that Congress meant, by adding the "except" clause, to strip the statute of any effect in cases where its sentences previously applied.

III. Finally, there is no reason to resort to the rule of lenity in this case. The statutory text, purpose, and history make clear that the "except" clause refers to sentences for violation of Section 924(c), not for different counts of conviction. Because that clause does not suffer from any grievous ambiguity or uncertainty, the rule of lenity does not apply.

ARGUMENT

A DEFENDANT WHO VIOLATES SECTION 924(c) IS SUBJECT TO A FIVE-YEAR MANDATORY MINIMUM SENTENCE UNLESS SECTION 924(c) OR ANOTHER PROVISION OF LAW REQUIRES A HIGHER MINIMUM SENTENCE FOR THAT OFFENSE

Section 924(c) provides that a defendant convicted of using or carrying a firearm during and in relation to any drug trafficking crime or crime of violence, or possessing a firearm in furtherance of such a crime, shall, in addition to any other punishment, be sentenced to a minimum term of five years of imprisonment, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Contrary to petitioner's various contentions, the "except" clause does not exempt a defendant from any sentence under Section 924(c) whenever he is subject to a higher mandatory minimum sentence for a different offense. Rather, as a majority of the courts of appeals to consider the question have reasoned, the provision applies to higher minimum sentences for the Section 924(c) offense itself.

I. The Text, Structure, Purpose, And History Of The "Except" Clause Make Clear That It Refers to Provisions Of Law Prescribing Minimum Sentences For Violating Section 924(c)

The "except" clause of Section 924(c) refers to other sentences for the offense defined in that statute—sentences that may be found either within Section 924(c) itself or elsewhere in the United States Code. That interpretation is the most natural reading of the "except" clause and, in particular, the phrase "any other provision of law." It also furthers the purpose of Section 924(c) to impose an additional, cumulative punishment on defendants who use or possess firearms in the commission of their crimes and thereby to provide an added deterrent to such conduct.

A. The "Except" Clause, Read Naturally, Refers To Other Sentences For Section 924(c) Violations

1. Section 924(c)(1)(A) provides that a defendant who engages in the described conduct must be sentenced to at least five years of imprisonment "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Although the "except" clause indicates that it is triggered when a defendant is subject to a "greater minimum sentence," the clause "does not say 'a greater minimum sentence' *for what*." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008), cert. denied, 129 S. Ct. 1688 (2009). Construed literally and without consideration of context, the "except" clause would eliminate any sentence under Section 924(c) whenever the defendant faced a greater mandatory minimum sentence for state-law charges, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing. Petitioners agree, however, that

the "except" clause cannot be "unbounded." *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). Indeed, as petitioner Abbott notes, a purely literal construction of the clause would render Section 924(c) "meaningless," because it would eliminate any sentence under that statute "simply because a higher mandatory minimum sentence exists in the United States Code for a crime the defendant did not commit." Abbott Br. 19; see Gould Br. 14. Thus, the clause must "have *some* understood referent to be intelligible." *Parker*, 549 F.3d at 11.

The "understood referent" of the clause is the offense set forth in the language that immediately follows: using, carrying, or possessing a firearm in connection with a crime of violence or a drug trafficking crime. Eight courts of appeals have thus concluded that the "except" clause does not exempt a defendant from punishment under Section 924(c) whenever he faces a longer mandatory minimum sentence for another crime. See *United States* v. *Villa*, 589 F.3d 1334, 1345 (10th Cir. 2009), petition for cert. pending, No. 09-1445 (filed May 26, 2010); *United States* v. *Segarra*, 582 F.3d 1269, 1272-1273 (11th Cir. 2009) (per curiam), petition for cert. pending, No. 09-8536 (filed Jan. 8, 2010); Abbott Pet. App. 12a; *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009) (adopting reasoning of *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006) (per curiam), cert. denied, 551 U.S. 1170 (2007)), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *United States* v. *Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 1281 (2010);

United States v. *Studifin*, 240 F.3d 415, 421-424 (4th Cir. 2001); *United States* v. *Alaniz*, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). Instead, as the Seventh Circuit has stated, the "except" clause means that "a defendant convicted under § 924(c)(1) shall be sentenced to a term of imprisonment set forth in § 924(c)(1)(A) unless subsections (c)(1)(B) or (c)(1)(C), or another penalty provision elsewhere in the United States Code, requires a higher minimum sentence for *that* § 924(c)(1) offense." *Easter*, 553 F.3d at 526.

This interpretation is "[t]he most natural reading of the relevant statutory text." See *United States* v. *Ressam*, 553 U.S. 272, 274 (2008). No one disputes that the phrase "this subsection" in the "except" clause refers to Section 924(c) and that a "greater minimum sentence * * * provided by this subsection" therefore means a greater minimum sentence for violating Section 924(c)(1)(A) as set forth in that provision. Specific subsections of Section 924(c) establish that in certain circumstances—for example, when the firearm involved is brandished or discharged—a defendant who possesses, uses, or carries a firearm in connection with a drug trafficking offense or crime of violence is subject to a penalty that exceeds the minimum five-year penalty set forth in Section 924(c)(1)(A)(i). Thus, if a defendant possessed a firearm in furtherance of a drug trafficking crime, that defendant is subject to a mandatory consecutive five-year sentence under Section 924(c)(1)(A)(i); *except* that if the firearm was brandished during the drug trafficking crime, the defendant is instead subject to the seven-year mandatory minimum sentence under Section 924(c)(1)(A)(ii); *except* that if the firearm is discharged during the crime, the defendant is instead

subject to a ten-year mandatory minimum sentence under Section 924(c)(1)(A)(iii); *except* that if the defendant has previously been convicted of violating Section 924(c)(1)(A), the defendant is instead subject to a minimum term of 25 years under Section 924(c)(1)(C)(i).

The meaning of "any other provision of law" is similarly straightforward. A "greater minimum sentence * * * provided by * * * any other provision of law" means a greater minimum sentence for violating Section 924(c) that is prescribed by a provision of the United States Code other than Section 924(c). See *Villa*, 589 F.3d at 1342-1343; Abbott Pet. App. 12a; *Easter*, 553 F.3d at 526; *Collins*, 205 Fed. Appx. at 198; *Studifin*, 240 F.3d at 423. That phrase makes clear that, if another provision of the United States Code mandates a punishment for using, carrying, or possessing a firearm in connection with a drug trafficking crime or crime of violence, and that minimum sentence is longer than the punishment applicable under Section 924(c), then the longer sentence applies.

This reading of the phrase "any other provision of law" accords with fundamental canons of statutory construction. This Court has emphasized that the language of a statute "cannot be interpreted apart from context." *Smith* v. *United States*, 508 U.S. 223, 229 (1993); see *Holloway* v. *United States*, 526 U.S. 1, 7 (1999) ("[T]he meaning of statutory language, plain or not, depends on context.") (citation omitted). The Court has also explained that when construing a statute, it does not "'look merely to a particular clause' but consider[s] 'in connection with it the whole statute.'" *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2317 (2008) (quoting *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974)). Similarly, a phrase should be "given more precise content by the neighboring words

with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008); see, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486-487 (2006).

The surrounding language confirms that the phrase "any other provision of law" refers to statutes imposing a greater minimum sentence for violating Section 924(c). Those words constitute half of a phrase—"by this subsection or by any other provision of law"—denoting the sources of law that may provide a "greater minimum sentence" triggering the "except" clause. 18 U.S.C. 924(c)(1)(A). All parties agree that the other part of that phrase ("this subsection") refers to provisions that prescribe minimum sentences for the Section 924(c) crime. Under the most natural reading, "any other provision of law" likewise refers to provisions elsewhere in the United States Code that address the same offense. The prefatory "except" clause, moreover, "is followed directly by the specific types of conduct prohibited under § 924(c)." *Villa*, 589 F.3d at 1343. There is "no linguistic or contextual demarcation separating the prescribed conduct from the prefatory clause." *Ibid.* As a result, the "except" clause is most reasonably read to refer to a "higher minimum sentence" for the offense that follows—possessing, using, or carrying a firearm in connection with a drug trafficking crime or crime of violence.

2. Petitioners contend that this interpretation of the phrase "any other provision of law" is incorrect because it would be "utter[ly] and "startlingly implausible," (Abbott Br. 10, 22, 25), "exceedingly unlikely," (*id.* at 25), and "strange[]" (Gould Br. 5) for Congress to impose mandatory penalties for a Section 924(c) offense in a different provision of the United States Code. But in fact, Congress has done exactly that in 18 U.S.C.

3559(c). And the history of that provision—which was amended in order to track changes to Section 924(c) in the same bill that contained the "except" clause—leaves no doubt that Congress understood the relationship between the two statutes.

Section 3559(c)(1)(A) provides that a defendant convicted of "a serious violent felony shall be sentenced to life imprisonment" if the defendant has been convicted in state or federal court on separate occasions of either "2 or more serious violent felonies" or "one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. 3559(c)(1)(A). The statute defines "serious violent felony" to include "firearms possession (as described in section 924(c))" and "firearms use," 18 U.S.C. 3559(c)(2)(F)(i), which is in turn defined as "an offense that has as its elements those described in section 924(c) * * *, if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and in relation to which the firearm was used was subject to prosecution in" federal or state court, 18 U.S.C. 3559(c)(2)(D). The statute therefore provides a mandatory minimum sentence for defendants who violate Section 924(c) with particularly serious criminal histories. Thus, under the "except" clause, a defendant who possesses a firearm in furtherance of a drug trafficking offense or crime of violence is subject to a mandatory consecutive five-year sentence under Section 924(c)(1)(A)(i), *except* that if the defendant was previously convicted on separate occasions of two serious violent felonies, the defendant is instead subject to a term of life imprisonment under 18 U.S.C. 3559(c)(1)(A)(i).

The drafting histories of Sections 924(c) and 3559(c) demonstrate that Congress understood the relationship

between the two statutes and intended them to be linked. Section 3559(c) was originally enacted as a part of the Violent Crime Control and Law Enforcement Act of 1994. See Pub. L. No. 103-322, § 70001, 108 Stat. 1982. When first enacted, as now, that statute defined "serious violent felony" to include "firearms use." 18 U.S.C. 3559(c)(2)(D) (1994). But the original definition of "serious violent felony" did not encompass "firearm possession," just as Section 924(c) at the time did not include that term.

In 1998, when Congress added the "except" clause, it also expanded Section 924(c) to cover possession of a firearm in furtherance of a predicate offense thereby to "counteract" this Court's decision in *Bailey* v. *United States*, 516 U.S. 137, 150 (1995) (holding that the "use" provision in Section 924(c) required the defendant to "actively employ[]" the firearm and did not cover mere possession). See *United States* v. *O'Brien*, 130 S. Ct. 2169, 2180 (2010). At the same time that Congress made those changes to Section 924(c), it also revised Section 3559(c) to make parallel changes. In particular, in the same bill that amended 924(c) to add the "except" clause and to encompass firearms possession, Congress amended Section 3559(c)(2)(F)(i) by expanding the definition of "serious violent felony" to include "firearms possession (as described in section 924(c))." See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a) and (b), 112 Stat. 3469-3470.[2]

Thus, when Congress added the "except" clause, it also amended Section 3559 to provide that a defendant

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[2] In the other significant change to Section 924(c) contained in that bill, Congress stepped up penalties when a firearm was "brandished" or "discharged"—concepts that were already present in, and that Congress borrowed from, Section 3559(c).

who possesses a firearm in violation of Section 924(c) must receive a mandatory minimum sentence of life if he has the requisite criminal history. These actions provide compelling evidence that Congress intended the phrase "[e]xcept to the extent that a greater minimum sentence is otherwise provided * * * by any other provision of law" to refer to sentences provided by other provisions of the United States Code, such as Section 3559(c), that impose greater minimum penalties for the 924(c)(1)(A) offense.[3]

3. In addition to providing instruction on how the amended Section 924(c) was intended to interact with other, existing provisions such as Section 3559(c), the phrase "any other provision of law" establishes a "safety valve" for future statutory provisions "that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)." *Collins*, 205 Fed. Appx. at 197-198 (finding convincing the reasoning of *Studifin*, 240 F.3d at 423 (interpreting language as a "safety valve" for future statutory provisions mandating

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[3] Section 3559(c) is not alone in imposing greater penalties for violation of Section 924(c). For example, 18 U.S.C. 924(j)(1)—a provision of law outside of "this subsection"—provides that a person who commits murder with a firearm in the course of a Section 924(c) offense may be sentenced to death. See, *e.g.*, *United States* v. *Battle*, 289 F.3d 661, 665-669 (10th Cir.) (concluding that Section 924(j)(1) sets forth a sentencing enhancement to the Section 924(c) offense analogous to increased punishments for brandishing or discharge), cert. denied, 537 U.S. 856 (2002); *United States* v. *Allen*, 247 F.3d 741, 769 (8th Cir. 2001) (holding that "§ 924(j) is fairly interpreted as an additional aggravating punishment for the scheme already set out in § 924(c)" because of "§ 924(j)'s explicit reference to § 924(c) and because each subsection of the statute is designed for the same purpose—to impose steeper penalties on those criminals who use firearms when engaging in crimes of violence"), vacated on other grounds, 536 U.S. 953 (2002).

penalties for the Section 924(c) offense)); see Abbott Pet. App. 13a.

Contrary to petitioner's contention, it is not "farfetched" or "implausible" that Congress would include language in Section 924(c) to allow for the possibility that it would later "create a longer mandatory minimum sentence for § 924(c) violations without making any mention of the new provision's interaction with § 924(c) itself." Abbott Br. 24; Gould Br. 21. As explained above, Sections 3559(c) and 924(j)(1) demonstrate that Congress has in fact enacted provisions outside of Section 924(c) establishing penalties for that offense.

More generally, there is nothing unusual about Congress prescribing mandatory minimum penalties for substantive offenses codified in other provisions. Section 3559 mandates a minimum term of life imprisonment not only for certain Section 924(c) offenses but also for violation of a range of other statutory provisions found elsewhere in the code, including 18 U.S.C. 1111 (murder), 49 U.S.C. 46502 (aircraft piracy), and 18 U.S.C. 2111, 2113, and 2118 (robbery). The ACCA is another familiar example of a provision that requires increased punishment for an offense that Congress defined earlier and elsewhere. Section 922(g)(1), which Congress enacted as a part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, sec. 902, § 922(e), 82 Stat. 230, makes it unlawful to possess a firearm after being convicted of an offense punishable by more than a year in prison. A defendant convicted of violating Section 922(g)(1) generally may be "imprisoned not more than 10 years." 18 U.S.C. 924(a)(2). In 1984, however, Congress provided in the ACCA that if a defendant who violates Section 922(g)(1) has been previously convicted of three or more violent

felonies or serious drug offenses, he is subject to a mandatory minimum sentence of 15 years. See Abbott Pet. App. 13a ("In referring to alternative minimum sentences, the prefatory clause mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the future—in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922.").

4. Petitioners argue on a number of grounds that the interpretation of the "except" clause adopted by the courts below is inconsistent with the plain meaning of the statutory text. None of those contentions is persuasive.

a. First, petitioners and their *amici* emphasize the breadth of the word "any," arguing that construing the "except" clause as referring to statutes providing a greater mandatory minimum for violating Section 924(c) effectively "read[s] 'any' other provision of law to mean only 'some' other provisions of law." Amicus Br. for Nat'l Ass'n of Crim. Def. Lawyers 14 (NACDL Amicus Br.). In support of that contention, petitioners rely on cases such as *United States* v. *Gonzales*, 520 U.S. 1 (1997), which adopted an expansive interpretation of the word "any" to hold that the phrase "any other term of imprisonment" in Section 924(c) includes sentences imposed under state law. *Id.* at 5.

The problem with that reading is suggested by petitioners themselves. Neither petitioner actually urges this Court adopt a literal reading of "any provision of law" that would encompass all provisions of law. Indeed, as Abbott notes in explaining why such a literal reading is untenable, interpreting "any other provision of law" without "restrictions or qualifiers," NACDL Amicus Br. 14, would mean that the "except" clause is always trig-

gered "simply because a higher mandatory minimum sentence exists in the United States Code." Abbott Br. 19. Similarly, despite their invocation of *Gonzales*, neither petitioner contends that the phrase "any other provision of law" includes state law, such that a defendant would be exempt from any sentence under Section 924(c) if he were subject to a higher mandatory minimum on a state-law conviction. And neither petitioners nor any court has held that the "except" clause is triggered by sentences for unrelated crimes charged in separate indictments. To the contrary, the Second Circuit has held that the "except" clause is not triggered by sentences for unrelated crimes even if those unrelated crimes are charged in the same indictment as the Section 924(c) count at issue. See *United States* v. *Parker*, 577 F.3d 143, 147 (2d Cir. 2009) (holding that the "except" clause did not apply because the crime carrying a higher mandatory minimum was unrelated to the Section 924(c) offense).

Instead, petitioners agree that the phrase "[e]xcept to the extent a greater minimum sentence is otherwise provided by * * * any other provision of law" must be read to refer only to a subset of the universe of laws providing mandatory minimum sentences. See pp. 32-33, *infra*. The question in this case thus is not whether the phrase "any other provision of law" must be qualified, but rather what qualification Congress intended. "The word 'any' considered alone cannot answer this question." *Small* v. *United States*, 544 U.S. 385, 388 (2005); see, *e.g.*, *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) ("[G]eneral words," such as the word "any," must "be limited" in their application "to those objects to which the legislature intended to apply them."); see also *Nixon* v. *Missouri Mun. League*,

541 U.S. 125, 132 (2004) ("any" means "different things depending upon the setting").[4]

b. Second, relying on *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), petitioners contend that it is unlikely Congress would have used the expansive term "any other provision of law" to denote the limited category of present or future statutes that would trigger the "except" clause under the courts of appeals' interpretation. Abbott Br. 22-24; Gould Br. 22 (criticizing the courts of appeals' interpretation of the "except" clause on the ground that Congress would not "enact such broad language if it had a narrow set of statutes in mind").

Petitioners' reliance on *Nijhawan*, however, is misplaced. That case concerned the meaning of 8 U.S.C. 1101(a)(43)(M)(i), which provides that an alien is deportable as an aggravated felon if he is convicted of "an offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 129 S. Ct. at 2297 (emphasis omitted). The Court concluded that the phrase could not be limited to offenses that have as an element a victim-loss requirement of more than $10,000. The Court based that conclusion in part on the ground that few such offenses exist. *Id.* at 2301-2302. But the function of the provision at issue in *Nijwahan* fundamentally differs from that of the "except"

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[4] Even if the phrase "any other provision of law" were given the most sweeping reading, the "except" clause would still be applicable only if, under any provision of law, a "greater minimum sentence is otherwise provided." That would leave the question of how to interpret the phrase "otherwise provided." Petitioners correctly concede that "otherwise provided" cannot be understood to mean "contained in any provision of the U.S. Code whether applicable to the defendant or not." Essentially for the reasons stated in this brief, the only plausible reading would be that the phrase means "otherwise provided for the violation of Section 924(c) at issue."

clause in Section 924(c). *Nijhawan* recognized that giving the scope-defining language of the statute the meaning the petitioner advanced would have frustrated Congress's purpose in including such offenses under the definition of "aggravated felony." In Section 924(c), by contrast, the "except" clause serves as a narrow *exception* to the general rule that a defendant who engages in the conduct described in 924(c)(1)(A) should receive a mandatory minimum five-year sentence. The government's interpretation of the exception thus advances, rather than frustrates, Congress's purpose in 924(c). See, *e.g.*, *Knight* v. *Commissioner*, 552 U.S. 181, 190 (2008) (Court is inclined, "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, [to] read the exception narrowly in order to preserve the primary operation of the provision") (brackets in original) (quoting *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989)). In addition, this Court rejected the petitioner's proposed interpretation in *Nijhawan* partly because it caused the statutory trigger to function in an irrational manner. See 129 S. Ct. at 2302 (noting seemingly random set of federal and state statutes that would trigger deportation under petitioner's interpretation). As explained below, however, the government's interpretation avoids the irrational results that petitioners' constructions would create. See pp. 39-43, *infra*.

c. Third, Abbott contends (Br. 25-26) that this Court's double-jeopardy precedents undermine the courts of appeals' interpretation of the "except" clause. In particular, Abbott argues that, construed only to prohibit multiple punishments for the same Section 924(c) offense, the phrase "any other provision of law" serves no purpose because it is redundant of the established

principle that "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." *Whalen* v. *United States*, 445 U.S. 684, 692 (1980).

That contention is incorrect and conflicts with petitioners' own understanding of the "except" clause. Petitioners agree that Congress included the phrase "this subsection" in the "except" clause to ensure that courts impose only one of the mandatory minimum sentences set forth in Section 924(c) for a violation of that statute. See Abbott Br. 15; Gould Br. 9. But if Congress had chosen to rely on the interpretive presumption against duplicative punishments when it drafted the "except clause," it would have had no need to include that phrase or indeed to add the clause at all. That Congress chose to adopt such language demonstrates that, instead of relying on courts to apply a background interpretive presumption, Congress chose to make explicit that persons who engage in the conduct proscribed by Section 924(c) must receive the single highest minimum sentence provided for that offense, whether that sentence is contained in "this subsection" or "any other provision of law."

B. The Natural Interpretation Of The Text Furthers The Central Purpose Of Section 924(c)

The text and legislative history of Section 924(c) make clear that the statute was intended to deter criminals from using or possessing guns in the course of certain crimes by ensuring that they would face an additional mandatory minimum sentence if they did so. That purpose is served by construing the "except" clause to refer to higher mandatory minimum sentences for the

Section 924(c) offense but not for other counts of conviction.

"The best evidence of [Congress's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Section 924(c) contains three central features that demonstrate its purpose to impose additional, cumulative mandatory minimum sentences on defendants who use, carry, or possess firearms in connection with crimes of violence or drug trafficking offenses and thereby create an added deterrent to committing such crimes with a firearm.

First, Section 924(c) specifies that the punishments it imposes "shall" be imposed "in addition to the punishment provided for" the underying "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). Second, the statute directs that its punishments apply even if the underlying crime of violence or drug trafficking offense "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Congress added that language to respond to this Court's decision in *Busic* v. *United States*, 446 U.S. 398 (1980), which held that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision." *Id.* at 404; see *Simpson* v. *United States*, 435 U.S. 6, 15 (1978) (holding that courts may not impose a sentence under Section 924(c) in addition to a weapons enhancement for the underlying offense). "Congress [thus] made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Gonzales*, 520 U.S. at 10. Third, Section 924(c)(1)(D)(ii)

makes explicit the requirement that the sentences for a violation of the statute must run consecutively to any other punishment. That provision states:

> Notwithstanding any other provision of law * * *, no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. 924(c)(1)(D)(ii). The text of Section 924(c) thus leaves no doubt that Congress intended the statute to create mandatory minimum sentences that apply over and above any punishment that the defendant faces on other counts of conviction.

Section 924(c)'s legislative history supports that conclusion. Senator Helms, the sponsor of the legislation that added the "except" clause, noted the "commonsense" proposition that "[v]iolent felons who possess firearms are more dangerous than those who don't." *Violent and Drug Trafficking Crimes: The* Bailey *Decision's Effect on Prosecutions Under Section 924(c): Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. 3-4 (1996) (*1996 Hearings*) (statement of Sen. Helms). He therefore explained that the measure he supported "will ensure that future criminals possessing guns * * * will serve real time when they possess a gun in furtherance of a violent or drug trafficking crime." *Criminal Use of Guns: Hearing on S. 191 Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. 3-4 (1997) (*1997 Hearings*) (statement of Sen. Helms). Representative McCollum, who introduced in the House the bill that added the "except"

clause, emphasized just before the bill's passage that the increased penalties it added are "enhancements on top of [any] underlying sentence for a crime that is committed with a gun." 144 Cong. Rec. 25,037 (1998) (statement of Rep. McCollum). Senator Biden captured the basic rationale of Section 924(c) in 1996 hearings about an earlier version of the bill that added the "except" clause:

> When we enhance penalties, whether they work or not, one of the underlying purposes—the rationale is we are trying to dissuade people from engaging in that activity. The bottom line here is what we intended was we don't want people carrying guns, committing crimes. We don't want people committing crimes, but if we have a choice, we want to penalize the person who thinks they may or may not need a gun, but nonetheless has it in their possession when they commit a crime—we want to punish that person more than the person who doesn't.

1996 Hearings 10 (statement of Sen. Biden).[5]

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[5] Abbott mischaracterizes the legislative history of the "except" clause in two significant respects. First, he contends that the government did not support inclusion of the "except" clause in the 1998 amendments and is now "asking this Court to provide it with a statute that Congress refused to enact." Br. 26-27. In fact, a Department of Justice representative testified before the Senate Judiciary Committee in both 1996 and 1997 that the Department supported in principle all of the bills under consideration, including those that contained the "except clause." *1996 Hearings* 7 (statement of Kevin Di Gregory, Deputy Asst. Att'y Gen.); *1997 Hearings* 9-13 (statement of Kevin Di Gregory, Deputy Asst. Att'y Gen.). The Department expressed "minor disagreement" with various aspects of the other bills, but it did not even mention—much less voice disapproval of—their introductory language. *Id.* at 10.

Second, Abbott describes (Br. 27-28) the amendments to Section

The natural reading of the "except" clause—to apply to other sentences for Section 924(c)—gives full effect to the deterrent purposes of Section 924(c). That interpretation requires imposition of the highest mandatory minimum penalty applicable to a Section 924(c) offense in addition and consecutive to the sentence for any other count of conviction. Consistent with Congress's intent, a defendant who commits a crime of violence or a drug trafficking offense with a gun will thus face an additional mandatory term of imprisonment as a result.

II. Petitioners' Interpretations Of The "Except Clause" Lack Any Basis In Statutory Text, Conflict With The Purpose And History Of Section 924(c), And Create Anomalies That Congress Could Not Have Intended

Contending that the interpretation of the "except" clause adopted by the majority of the courts of appeals is unreasonable, petitioners instead offer three conflicting readings of that provision. First, Abbott contends (Br. 15-21) that the clause refers to sentences for offenses that the defendant commits in the "same criminal transaction" giving rise to the Section 924(c) offense. Second, Abbott switches gears and argues (Br. 39-47) that the clause refers to sentences for other firearms-specific offenses arising from possession of the same gun

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924(c) that added the "except" clause as "fundamentally a compromise," arguing that the legislation was intended in part to mitigate increased punishments for armed criminals. That characterization is unfounded. The hearings on the bill reflected broad bipartisan support for expanding and increasing the punishments for possessing a gun in the course of predicate crimes. Remarking on that consensus, Senator Biden thanked the chairman "for being so vigilant and moving so rapidly on this" and stated: "This is an unusual day. The record should note that Biden, the Justice Department and Jesse Helms all agree on something." *1996 Hearings* 11-12 (statement of Sen. Biden).

involved in the Section 924(c) offense. Third, Gould disagrees with Abbott, contending instead (Gould Br. 4-5, 7-18) that the "except" clause refers to any sentence the court may impose for any crime at the time the defendant is sentenced for the Section 924(c) offense.

These interpretations are incorrect. Each depends on textual interpolations that find no support in the plain language of Section 924(c). In addition, all three interpretations frustrate the purpose of Section 924(c), contradict its legislative history, and create anomalies that Congress could not have intended when it amended Section 924(c) to add the "except" clause.

A. Petitioners' Interpretations Find No Support In The Text Of Section 924(c)

Petitioners purport to ground their interpretations of the "except" clause in the statute's plain language, contending that the courts of appeals' principal error was "depart[ing] from the 'except' clause's actual text" and "forc[ing] into the statute words that Congress did not include." Gould Br. 5. All of petitioners' interpretations, however, require this Court to infer from Section 924(c) various implausible qualifications that are nowhere contained in its "actual text." *Ibid.*

1. Both Abbott and Gould premise their positions on the words "any other provision of law," which they describe as an "expansive" and "open-ended" phrase that "means a provision of law, other than [Section] 924(c), selected without restriction." Abbott Br. 16-17 (emphasis omitted); Gould Br. 12-13. But petitioners' proposed interpretations require significant restrictions and qualifications on the reach of the phrase "any other provision of law." Abbott's primary position construes that phrase as if it read "any other provision of law that the defen-

dant violates in the same criminal transaction that gave rise to the Section 924(c) offense." Abbott's alternative argument converts "any other provision of law" into "'any other provision of law' * * * that imposes a 'greater minimum sentence' for the defendant's possession or use of the same firearm" involved in the Section 924(c) offense. Br. 39. And Gould's interpretation requires interpreting "any other provision of law" as if it read "any other provision of law" that imposes a greater mandatory minimum sentence "required for any of a defendant's counts of convictions at sentencing" on the Section 924(c) count. Br. 14. Thus, contrary to petitioners' contentions, their interpretations hardly "[r]ead[] 'any other provision of law' to mean what it says." Abbott Br. 17.

The qualifications petitioners propose, moreover, are textually implausible. Petitioners have provided no principle of statutory construction that explains why the phrase "any other provision of law" actually means laws violated as part of the same criminal transaction giving rise to the Section 924(c) violation; laws violated by the possession or use of the same firearm that was involved in the Section 924(c) offense; or laws that impose mandatory minimum punishments available to the court at the time of sentencing on the Section 924(c) crime. Abbott does not attempt to supply such an explanation based on specific aspects of the statutory text. And although Gould purports to locate support for his interpretation (Br. 14-15) in the present tense phrasing of the "except" clause and the words "is otherwise provided," that contention lacks merit. In common parlance, a punishment "is provided" by a statute even if that punishment does not apply at the sentencing of a particular defendant. The text of the "except" clause thus does not support

petitioners' positions. See *Parker*, 549 F.3d at 11 (noting that interpreting the referent of the "except clause" as "'any other crime related to this case' or 'the underlying drug crime or crime of violence' * * * require[s] reading into the clause a referent not literally expressed") (emphasis omitted); *Alaniz*, 235 F.3d at 389 ("We have scoured the statutory language, yet we find no support for the proposition * * * that subdivision (c)(1)(A)'s 'greater minimum sentence' clause applies to the predicate drug trafficking crime or crime of violence of which a particular defendant has been convicted").

B. Petitioner's Interpretations Frustrate The Purpose Of Section 924(c)

Petitioners also attempt to justify their interpretations on the basis of statutory purpose. The goals that petitioners attribute to Congress in enacting Section 924(c), however, cannot be squared with the text of that provision.

1. a. In support of his primary position, Abbott contends (Br. 20) that "[t]he reason is simple" that the "except" clause must be read to refer to sentences for other counts of conviction arising from the same "criminal transaction" as the Section 924(c) offense. That reason, he argues, is the "obvious purpose" of Section 924(c): "to ensure that a defendant receives at least five years in prison as a result of using or possessing a gun in connection with a violent crime or drug trafficking offense." *Ibid.* Thus, Abbott contends, "[i]f the same defendant receives more than five years' imprisonment because another statute, triggered by the same criminal transaction, imposes a higher mandatory minimum, the plain language and obvious purpose of [Section] 924(c) are satisfied." *Ibid.* Gould advances the same account of

the statute's purpose. See Br. 17 (contending that "Congress wanted to ensure that a defendant who commits a drug-trafficking or violent crime using, carrying, or possessing a firearm will spend at least 5 years in prison," and that "Congress reasonably believed that this purpose is served if that defendant is subject to a mandatory minimum sentence of more than 5 years for * * * the drug trafficking crime")

That contention is inconsistent with the text of Section 924(c). If Congress had intended only to ensure that a defendant convicted of Section 924(c) serves a total of at least five years in prison for all of his crimes, Congress easily could have accomplished that purpose by providing that the mandatory minimum sentence for the Section 924(c) offense should run concurrently with the sentences for other counts of conviction, including any sentence for the underlying drug trafficking offense or violent crime. But as explained above, Congress did precisely the opposite. It directed that the mandatory minimum sentence for the Section 924(c) must be imposed "*in addition to*" the sentence for any other crime, 18 U.S.C. 924(c)(1)(A) (emphasis added), and it separately instructed that the Section 924(c) sentence shall *not* "run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. 924(c)(1)(D).

Petitioners' explanations of the statute's purpose fail to account for these central aspects of its text. As the Fourth Circuit has explained, petitioners'

> construction of § 924(c) simply makes no sense in light of Congress's clear intent in § 924(c) to impose mandatory consecutive sentences, as opposed to

> choosing between one or the other sentence, and indeed would be patently inconsistent with the intent expressed in § 924(c)(1)(D)(ii) to require mandatory consecutive sentences against those who commit crimes of violence while using or carrying firearms in furtherance of their crimes.

Studifin, 240 F.3d at 423; see *Parker*, 549 F.3d at 11 ("[Defendant's] reading is suspect on its face because section 924(c)(1)(A)'s supplementary provision ([Section 924(c)(1)(D)])—by providing a five year sentence 'in addition to the punishment' for the predicate crime— self-evidently intends that one who carries a firearm in connection with a serious drug offense should serve a further consecutive sentence of five years.").

b. To support his alternative argument, Abbott mints an altogether different explanation of the purpose of Section 924(c) and its "except" clause. He contends that the "except" clause must be understood to refer to other offenses arising from the same firearm involved in the Section 924(c) count because that clause was intended to avoid "*double counting* the use or possession of the same firearm in the same transaction." Br. 39; *id.* at 45 ("except" clause represented "an effort to avoid duplicate punishments for firearm possession"); *ibid.* ("Congress wished to avoid a double increment for the same firearm") (citation omitted).

The suggestion that cumulative punishment would involve "double counting," however, overlooks the different functions of Section 924(c) and the ACCA. The ACCA punishes any possession of a firearm by a felon who has a particularly serious history of recidivism. Its focus is on the repeat offender, not on a particular use of a firearm. Section 924(c), in contrast, requires no criminal history, but instead punishes the injection of a fire-

arm into another crime. To substitute the recidivism enhancement in the ACCA for the separate Section 924(c) sentence effectively gives the defendant the use of a gun facilitating another crime for free.

The language Congress added to Section 924(c) in response to this Court's decision in *Busic*, moreover, refutes the notion that Congress viewed Section 924(c) as implicating double counting. In *Busic*, the Court held that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision" for use of the firearm. 446 U.S. at 404; see *Simpson*, 435 U.S. at 15 (holding that a federal court may not impose sentences under both Section 924(c) and the weapon enhancement under the armed bank robbery statute, 18 U.S.C. 2113, based on a single criminal transaction). Repudiating that decision, "Congress amended § 924(c) so that its sentencing enhancement would apply regardless of whether the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *Gonzales*, 520 U.S. at 10 (quoting Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1005(a), 98 Stat. 2138). "At that point, Congress made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Ibid.* Given that history, Abbott cannot plausibly contend that Congress intended to prevent "double counting" for firearms offenses.

2. The true purpose of Section 924(c) renders petitioners' interpretations unreasonable. As explained above, the text and history of that statute make clear that Congress sought to create a deterrent to using or

possessing guns during predicate crimes by ensuring that any defendant who does so will receive an additional mandatory minimum sentence over and above other applicable sentences. All three of petitioners' interpretations, however, would eliminate any sentence for the Section 924(c) offense when the defendant faced a higher mandatory minimum on a different count of conviction.

Under Gould's position, a defendant would escape any sentence under Section 924(c) if, at the time of sentencing, he faces a mandatory minimum for any other offense, however unrelated to the Section 924(c) conduct. Under Abbott's primary position, a defendant would receive no separate sentence for using, carrying, or possessing a firearm if the underlying crime triggers the ten-year mandatory minimum set forth in the Controlled Substances Act (CSA). See 21 U.S.C. 841(b)(1)(A) (prescribing ten-year mandatory minimum for, *inter alia*, trafficking in more than five kilograms of cocaine or 50 grams of cocaine base). And under Abbott's alternative interpretation, a defendant who possesses a firearm in furtherance of a crime of violence or a drug trafficking offense would be exempt from any punishment for the Section 924(c) offense if he is also convicted of being a felon-in-possession and has three prior qualifying convictions under the ACCA. See 18 U.S.C. 924(e) (requiring a 15-year mandatory minimum if a defendant violates Section 922(g)(1) and has previously been convicted of three violent felonies or serious drug offenses).

Petitioners' interpretations of the "except" clause would thus frustrate the purpose of Section 924(c) in each of those situations. For the reasons petitioners' *amicus* emphasizes, moreover, the circumstances ad-

dressed by petitioners' interpretations are extraordinarily common. "The drug trafficking and firearms possession statutes that produce related counts of conviction account for almost all minimum sentences that could come into play under the 'except' clause." NACDL Amicus Br. 17 n.5; *id.* at 12 ("the two most likely sources of greater minimum sentences are the CSA and the ACCA"). Thus, under petitioners' interpretations, Section 924(c) would not achieve its purpose in precisely the circumstances for which it was intended and in which it is most commonly invoked.

C. Petitioners' Interpretations Create Sentencing Anomalies That Congress Could Not Have Intended

Petitioners' various readings of the "except" clause create anomalies that Congress could not have intended when it amended Section 924(c) in 1998.

1. a. Under all of petitioners' interpretations, a defendant convicted of violating Section 924(c) would receive no sentence for that offense when the "except" clause applies. See Gould Br. 33-34 (contending that, in circumstances triggering the "except" clause, a sentence for the Section 924(c) sentence "would never be imposed at all") (quoting *Williams*, 558 F.3d at 172). Petitioners' interpretations thus effectively treat Section 924(c) as a mere sentencing enhancement that can be displaced by some greater minimum for a different offense. Cf. *United States* v. *Whitley*, 529 F.3d 150, 151 (2d Cir. 2008) (describing Section 924(c) as a "sentencing statute"). "But [Section] 924(c) does not define an enhancement; it defines a standalone crime" of using, carrying, or possessing a firearm in connection with a drug or violent offense. *Easter*, 553 F.3d at 526; see *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009) ("The princi-

pal paragraph [of Section 924(c)] defines a complete offense."); *Harris* v. *United States*, 536 U.S. 545, 553 (2002). The result required by petitioners' positions—a Section 924(c) conviction for which the defendant receives no sentence whatsoever—is highly anomalous. As the Seventh Circuit observed, "[a] determination of guilt that yields no sentence is not a judgment of conviction at all." *Easter*, 553 F.3d at 526.

b. Petitioners' interpretations would produce mandatory minimum sentences for less culpable defendants that are higher than those for more culpable defendants. As the court of appeals explained, that anomaly is illustrated by considering two defendants convicted of trafficking in cocaine—the first possessing 500 grams and therefore subject to a mandatory minimum sentence of five years under 21 U.S.C. 841(b)(1)(B), and the second possessing five kilograms (ten times the amount) and thus subject to a mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). If the first defendant brandished a firearm in furtherance of his drug offense, all agree that the "except" clause would not apply and the defendant would be subject to two mandatory minimum sentences totaling 12 years: a five-year sentence under 21 U.S.C. 841(b)(1)(B) and a consecutive mandatory minimum sentence of seven years under Section 924(c)(1)(A)(ii). But if the second defendant brandished a firearm in furtherance of his much more serious drug offense, under Gould's and Abbott's principal position the "except" clause would apply, the seven-year mandatory minimum in Section 924(c)(1)(A)(ii) would disappear, and the defendant would be subject to a single mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). Thus, the more culpable offender would face a lesser minimum sentence—precisely *because* his

underlying offense is more serious. It is inconceivable that Congress intended such a result. See Abbott Pet. App. 15a (discussing this and other sentencing anomalies and concluding that "[w]e are confident that Congress did not intend such a bizarre result").

c. Similar anomalies arise from Abbott's alternative argument, which interprets the "except" clause to apply to sentences under other firearms-specific statutes for possession of the same weapon involved in the Section 924(c) offense. Consider, for example, the relatively typical case of a defendant convicted of a drug trafficking offense carrying a ten-year mandatory minimum term, a Section 924(c) "brandishing" offense, and a Section 922(g) felon-in-possession offense. Under Abbott's alternative interpretation, if that defendant is subject to the ACCA on the Section 922(g) offense because he has an extensive criminal history, he would face a minimum of 15 years in prison, consisting of the mandatory minimum under 18 U.S.C. 924(e) running concurrently with the sentence for the drug conviction. That defendant would benefit from the "except" clause and face no penalty for violating Section 924(c). A defendant who committed all the same crimes, however, would face a higher mandatory minimum sentence if he were not subject to the ACCA. That defendant would be required to serve 17 years—two years longer than the identically situated armed career criminal—because he would be subject to a mandatory minimum term of ten years for the underlying drug crime plus seven consecutive years for the Section 924(c) violation. Thus, the first defendant is subject to a *less* severe statutory minimum because he has a *more* serious criminal history. This cannot be what Congress intended.

d. Gould's interpretation, which turns on what other minimum sentences are available to the court at the time of sentencing on the Section 924(c) offense, would create the additional anomaly that the form of the government's charging instruments determines the applicability of the "except" clause. Consider, for example, a defendant who committed three crimes: (1) a robbery in 2001; (2) discharge of a gun during that robbery (carrying a mandatory ten-year minimum under Section 924(c)(1)(A)(iii)); and (3) possessing a gun in 2005, after sustaining three prior violent felony or serious drug convictions, in violation of 922(g) and 924(e) (carrying a 15-year mandatory minimum under the ACCA). Under Gould's reading, if the defendant were charged with all of those crimes in a single indictment, the "except" clause would apply and the ten-year minimum sentence under Section 924(c) would disappear. Because he would be sentenced at the same time on the entirely unrelated ACCA offense, the defendant would escape any statutory penalty for having violated Section 924(c) four years earlier. By contrast, if the government charged the Section 924(c) offense separately from the unrelated ACCA offense, then under Gould's interpretation the "except" clause would not be triggered at sentencing and the defendant would be subject to multiple and consecutive mandatory minimums.

There is no logical reason why the applicability of a sentence under Section 924(c) should turn on how the government crafts its charging instruments. Indeed, this Court rejected a similar proposition in *Deal* v. *United States*, 508 U.S. 129 (1993), dismissing as implausible an interpretation of Section 924(c) that "would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions of

§ 924(c)(1) by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment." *Id.* at 133. The court declined "to give the statute a meaning that produces such strange consequences." *Id.* at 134. Like the construction rejected in *Deal*, Gould's "reading would confer the extraordinary new power to determine the punishment for a charged offense by simply modifying the manner of charging." *Id.* at 134 n.2 (emphasis omitted).

2. Petitioners contend on various grounds that these anomalies do not undermine their proposed interpretations of the "except" clause. Those contentions lack merit.

a. First, petitioners contend that these anomalies do not constitute the type of "absurdities" that would justify "disregard[ing] a statute's plain meaning based on the results such a reading would produce." NACDL Br. 25; Abbott Br. 30. For the reasons explained above, however, petitioners' interpretations do not reflect the plain meaning of Section 924(c), nor are they supported —much less compelled—by the statute's "plain text." Gould Br. 34. Rather, the anomalies created by petitioners' interpretations illustrate the conflict between the practical effect of those interpretations and the purposes of Section 924(c). They simply confirm what an analysis of statutory text and purpose make clear: petitioners' proposed interpretations of the "except" clause are unnatural and incorrect. See *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

b. Second, petitioners attempt to rationalize the anomalies on the ground that such outcomes concern only the applicable minimum sentence, not the total sen-

tence that any particular defendant will actually receive. Petitioners contend that, when the "except" clause applies, the district court may correct any anomaly or disparity in the minimum sentence by exercising its discretion under 18 U.S.C. 3553(a) to increase the sentence on the other offenses of conviction. But Congress added the "except" clause to Section 924(c) in 1998, seven years before this Court ruled in *United States* v. *Booker*, 543 U.S. 220 (2005), that district courts may vary from the Sentencing Guidelines based on Section 3553(a) to fashion an appropriate punishment in the particular case. Congress therefore could not have intended to rely on the discretion afforded by Section 3553(a) as a means of correcting anomalies resulting from the "except" clause. Abbott Pet. App. 18a ("Congress could not have intended to create such sentencing disparities with the clairvoyant expectation that seven years later the Supreme Court would * * * grant district judges the discretion to cure such injustices.") (citing *Booker*, *supra*); *Easter*, 553 F.3d at 526-527.

All of petitioners' arguments that rely on the discretion of the district court suffer from the obvious flaw that statutory mandatory minimums are designed specifically to limit a judge's sentencing discretion. In enacting Section 924(c), Congress intended to circumscribe the district court's ability to adjust sentences in cases in which defendants possessed, used, or carried a firearm in connection with predicate offenses by providing mandatory minimum sentences for that crime. It would make no sense for Congress to limit district court discretion in this way and simultaneously to rely on the exercise of sentencing discretion on other counts to effectuate the statute's purpose and avoid anomalous results.

c. Petitioners next contend (Abbott Br. 32-35; Gould Br. 29-30) that Congress intended for provisions of the Sentencing Guidelines in effect since 1998 to resolve the sentencing anomalies resulting from their interpretations of the "except" clause. They emphasize Guidelines provisions requiring a court to increase a defendant's offense level when the offense involves a firearm. See Sentencing Guidelines §§ 2D1.1(b)(1), 2K2.1(b)(6). They also point to a Guidelines provision, Sentencing Guidelines § 5K2.6, that allows district judges to depart upward from the applicable Guidelines range when an offense involves a firearm. This argument contravenes both statutory text and the congressional intent behind Section 924(c).

The text of Section 924(c) demonstrates that Congress did not consider firearm-related Guidelines enhancements to be an adequate substitute for the mandatory minimum penalties set forth in that statute. Section 924(c)(1)(A) provides that a defendant must receive a consecutive term of imprisonment for violating the statute even if the predicate drug trafficking crime or violent crime already "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 924(c)(1)(A). As set forth above, Congress added that language to repudiate this Court's decisions in *Busic* and *Simpson*. See pp. 28, 37, *supra*; *Gonzales*, 520 U.S. at 10. In doing so, "Congress made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Ibid.* If Congress rejected the view that statutory enhancements to a predicate offense were sufficient to punish a violation of Section 924(c), it follows that Congress did not believe

that the sentencing enhancements under the Guidelines for those predicate offenses could achieve its desire to impose incremental additional punishment for the Section 924(c) offense.

Petitioners' argument also runs counter to Section 924(c)'s legislative history. At the 1996 congressional hearings in response to the *Bailey* decision, Professor David Zlotnick urged reliance on the Guidelines' enhancement scheme. See *1996 Hearings* 46 (statement of David M. Zlotnick). But that is not the path Congress chose. Instead, as one witness summarized at the 1997 hearings, Congress made a judgment that the "enhancements [provided by the Sentencing Guidelines] are relatively minor and may have little or no impact on the sentence that is actually imposed. The Sentencing Guidelines are thus no substitute for the tough mandatory penalties of [S]ection 924(c)." *1997 Hearings* 34 (statement of Thomas G. Hungar).

d. Finally, petitioners argue (Abbott Br. 35-36; Gould Br. 34) that the anomalies resulting from their positions would arise only in "isolated hypothetical situation[s]" that are not representative of the "run of cases" in which Section 924(c) is charged. Abbott Br. 35 (quoting *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 42 (1928) (Holmes, J., dissenting); Gould Br. 34 (describing the comparisons presenting anomalies as "imagined" and "fanciful hypotheticals") (brackets and citation omitted). That is incorrect. There is nothing remotely "fanciful" about federal prosecutions in which defendants are convicted of various permutations of offenses carrying different mandatory minimum sentences under Section 924(c), the CSA, and the ACCA. As petitioners' *amicus* notes, "indictments containing both CSA and Section 924(c) charges" are "routine." NACDL

Amicus Br. 13; *ibid.* (observing of the CSA and the ACCA that "it is common for one or both to be charged alongside" a Section 924(c) count).

D. Petitioners' Interpretations Are Unsupported By The Legislative History Of Section 924(c)

Petitioners' readings of the "except" clause find no support in the history of Section 924(c)(1)(A). Petitioners do not dispute that, under the pre-1998 version of that statute, a defendant convicted of violating Section 924(c) would have faced a mandatory sentence for that offense even if he also faced a higher mandatory minimum sentence for a different crime. They contend, however, that the effect of the 1998 amendments was to create a significant exemption in the statute by rendering a sentence for the Section 924(c) offense inapplicable in those circumstances. The legislative history of the 1998 amendments refutes that contention.

As this Court recently explained in *O'Brien*, Congress made "two [significant] substantive changes" in 1998 to the prior version of Section 924(c). 130 S. Ct. at 2179. First, Congress converted what were previously mandatory fixed sentences into mandatory minimum sentences. Thus, "[a] person convicted of the primary offense of using or carrying a firearm during a crime of violence was once to 'be sentenced to imprisonment for five years,' but under the current version he or she is to 'be sentenced to a term of imprisonment of not less than 5 years.'" *Ibid.* Second, in response to this Court's decision in *Bailey*, Congress expanded the reach of the statute by adding the word "possesses" in addition to "uses or carries" in the principal paragraph and by adding graduated minimum sentences for brandishing and discharging a firearm. *Ibid.*

The evident purpose and effect of these two changes was to expand and increase sentences for defendants who use, carry, or possess firearms in connection with other crimes. Petitioners' interpretations yield precisely the opposite effect, eliminating the Section 924(c) penalties altogether for the most serious offenders who commit predicate crimes carrying high minimum sentences. But as *O'Brien* indicates, the legislative history contains no support for that result. "Aside from shifting the mandatory sentences to mandatory minimums, and th[e] so-called *Bailey* fix, Congress left the substance of the statute unchanged" in the 1998 amendments. *O'Brien*, 130 S. Ct. at 2179. "Neither of these substantive changes suggests that Congress meant," by adding the "except" clause, to effect the profound change in the statute's operation that petitioners urge. *Ibid.*

III. The Rule of Lenity Does Not Apply

Petitioners contend that "[a]t the very least," "the statute is ambiguous as to its reach," and therefore the rule of lenity requires this Court to adopt one of their constructions. See Abbott Br. 37-38, 47-48; Gould Br. 36-39. There is no reason to resort to the rule of lenity here.

"The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). It is implicated only when, after "[a]pplying well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991), a court "can make no more than a guess as to what Congress intended." *Reno* v. *Koray*, 515 U.S. 50, 65 (1995) (internal quotation

marks and citation omitted); see *Smith*, 508 U.S. at 239 (the "rule [of lenity] is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute") (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971)) (internal quotation marks omitted). For the rule to apply, there must be "grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted), such that "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).

For the reasons explained above, the meaning of the "except" clause is clear in light of established principles of statutory interpretation. "The text, context, purpose, and" history of that clause "all point in the same direction:" a defendant must be sentenced to the highest applicable minimum sentence for the Section 924(c) offense, whether that minimum sentence is set forth in "this subsection" or "any other provision of law." *United States* v. *Hayes*, 129 S. Ct. 1079, 1089 (2009). Because the "except" clause does not suffer from any "grievous ambiguity or uncertainty," *Muscarello*, 524 U.S. at 139 (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994)), the rule of lenity does not apply. See, *e.g.*, *Barber* v. *Thomas*, No. 09-5201 (Jun. 7, 2010), slip op. 17 (holding that the rule of lenity does not apply because the government's interpretation "reflects the most natural reading of the statutory language and the most consistent with its purpose"); *Dean*, 129 S. Ct. at 1856 (concluding that the discharge provision of Section 924(c)(1)(A)(iii) was not "grievously ambiguous" after considering "the statutory text and structure"); *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (rejecting ap-

plication of the rule of lenity where the defendant's interpretation "is an implausible reading of the congressional purpose").

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 924(c)(1) (1994) provides:

Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.[2] Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

---

[2] See 1988 Amendment note below.

2. 18 U.S.C. 924(c)(1) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

3. 18 U.S.C. 3559(c) provides:

Sentencing classification of offenses

(c) IMPRISONMENT OF CERTAIN VIOLENT FELONS.—

(1) MANDATORY LIFE IMPRISONMENT.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) DEFINITIONS.—For purposes of this subsection—

(A) the term "assault with intent to commit rape" means an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242);

(B) the term "arson" means an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive;

(C) the term "extortion" means an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person;

(D) the term "firearms use" means an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both;

(E) the term "kidnapping" means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force;

(F) the term "serious violent felony" means—

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse

(as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

(G) the term "State" means a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States; and

(H) the term "serious drug offense" means—

(i) an offense that is punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)); or

(ii) an offense under State law that, had the offense been prosecuted in a court of the United

States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)).

(3) NONQUALIFYING FELONIES.—

(A) ROBBERY IN CERTAIN CASES.—Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

(B) ARSON IN CERTAIN CASES.—Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) the offense posed no threat to human life; and

(ii) the defendant reasonably believed the offense posed no threat to human life.

(4) INFORMATION FILED BY UNITED STATES ATTORNEY.—The provisions of section 411(a) of the Controlled Substances Act (21 U.S.C. 851(a)) shall

apply to the imposition of sentence under this subsection.

(5) RULE OF CONSTRUCTION.—This subsection shall not be construed to preclude imposition of the death penalty.

(6) SPECIAL PROVISION FOR INDIAN COUNTRY.—No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to this subsection for any offense for which Federal jurisdiction is solely predicated on Indian country (as defined in section 1151) and which occurs within the boundaries of such Indian country unless the governing body of the tribe has elected that this subsection have effect over land and persons subject to the criminal jurisdiction of the tribe.

(7) RESENTENCING UPON OVERTURNING OF PRIOR CONVICTION.—If the conviction for a serious violent felony or serious drug offense that was a basis for sentencing under this subsection is found, pursuant to any appropriate State or Federal procedure, to be unconstitutional or is vitiated on the explicit basis of innocence, or if the convicted person is pardoned on the explicit basis of innocence, the person serving a sentence imposed under this subsection shall be resentenced to any sentence that was available at the time of the original sentencing.

REPLY BRIEF

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In The
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CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTRODUCTION

18 U.S.C. § 924(c)(1)(A) requires a 5-year minimum sentence for possessing a firearm in furtherance of a drug-trafficking or violent crime, to run consecutively and "in addition to" any sentence for that crime, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by ... *any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added). The parties agree that the "except" clause's application turns on the meaning of "any other provision of law." As Petitioner showed (Pet. Br. 10-13), this interpretive question is answered by this Court's holding in *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009), that, based on the expansive meaning of "any," this phrase cannot be limited to a certain "class of provisions." Petitioner further showed that, based textually and contextually on the phrase's expansiveness and on section 924(c)(1)(A)'s focus on minimum sentences provided at sentencing, the "except" clause exempts a defendant from the consecutive, additional 5-year minimum sentence when *any* law for *any* count of conviction requires a greater minimum sentence at sentencing. Pet. Br. 7-18. This ensures that defendants who further drug-trafficking or violent crimes by possessing firearms will always serve at least 5 years, whether based on section 924(c)(1)(A) or any other provision of law.

Incredibly, the government's response fails to address *Beaty* at all, despite asking the Court to limit "any other provision of law" to a certain class of provisions: those for violating section 924(c). The

government's interpretation cannot be reconciled with this Court's decisions or the "except" clause's plain language, particular purpose, context, or drafting history.

ARGUMENT

I. PETITIONER'S INTERPRETATION OF THE "EXCEPT" CLAUSE, UNLIKE THE GOVERNMENT'S, REFLECTS 18 U.S.C. § 924(c)(1)(A)'S PLAIN TEXT.

According to the government, the "except" clause exempts defendants from section 924(c)(1)(A)'s sentence for possessing a firearm in furtherance of a drug-trafficking or violent crime only when "any other provision of law" requires a greater minimum sentence for the same offense. U.S. Br. 13. Under the government's cramped interpretation of "any other provision of law," only a greater minimum sentence for violating section 924(c) would ever trigger the "except" clause. The government has identified just one such law: 18 U.S.C. § 3559(c), which requires a life sentence for violating section 924(c) when, for example, a defendant has committed a "serious violent felony" twice before. *Id.* at 21. (The government notes that 18 U.S.C. § 924(j) provides penalties for violating section 924(c). *Id.* at 21 n.3. But section 924(j) cannot trigger the "except" clause because it does not require a minimum sentence greater than section 924(c)(1)(A) provides. *E.g.*, 18 U.S.C. § 924(j)(1).) The government's interpretation does not

reflect the "except" clause's plain meaning and should be rejected.

A. The government ignores the expansiveness of the phrase "any other provision of law."

The parties agree that the trigger for applying the "except" clause is the phrase "any other provision of law." The government interprets this phrase to mean not "any other provision of law" but "any other provision of law for violating section 924(c)." *See* U.S. Br. 13. This argument contravenes the holding in *Beaty* that the expansive phrase "any other provision of law" does not denote a certain "class of provisions." 129 S. Ct. at 2189. Petitioner's opening brief highlighted *Beaty*. Pet. Br. 4, 10-11. The government's brief, perplexingly, ignores it entirely. But *Beaty* makes clear that "any other provision of law" means just that – *any* provision of law, not a particular provision for a particular offense or just some (or almost no) provisions of law.

The government argues that Petitioner emphasizes the breadth of "any other provision of law" but does not interpret it to encompass state laws or laws that apply to counts of conviction in separate indictments or for which a defendant was previously sentenced. U.S. Br. 14, 23-24. According to the government, Petitioner interprets "any other provision of law" to mean a subset of laws, just like the government. *Id.* at 24. Unlike the government, however,

Petitioner does not interpret this phrase to mean a certain law concerning a certain offense – however ill-defined the government's limitation to a "section 924(c) offense" or "violation" may be. No such limitation can be found in this expansive phrase. Limiting it to a certain offense conflicts with its plain meaning, as the Court held in *Beaty*, and dooms the government's interpretation.

As explained in Petitioner's opening brief, other language within the "except" clause provides all the limitation Congress intended – and makes the clause's referent clear. Pet. Br. 13-15. The clause is triggered only by greater minimum sentences that apply to a defendant at sentencing, regardless of which "provision[s] of law" provide them.

Rather than consider section 924(c)(1)(A)'s entire text, as Petitioner does, the government criticizes Petitioner's textual analysis by relying on "common parlance" to argue that "a punishment 'is provided' by a statute even if that punishment does not apply at the sentencing of a particular defendant." U.S. Br. 33. But the government elsewhere disavows that interpretation of "is provided," under which any greater minimum sentence in the U.S. Code for violating section 924(c) would trigger the "except" clause, whether the sentence applied to the defendant or not. *Id.* at 25 n.4. If that interpretation were correct, the mere existence of section 3559(c)'s mandatory life sentence provision would always trigger the clause and preclude the imposition of any of section 924(c)(1)(A)'s sentences.

In fact, the government itself interprets the "except" clause's phrase "is otherwise provided" as Petitioner does: Only minimum sentences that apply to a defendant at sentencing will trigger the clause. *See id.* When a minimum sentence for any count of conviction *does* apply to a defendant and *is* greater than section 924(c)'s applicable minimum, the clause is triggered. This is the only interpretation that section 924(c)(1)(A)'s text supports.

B. The government's interpretation of the "except" clause relies on an inapplicable canon and an indefensible presumption.

The government offers only two textual arguments for its crabbed interpretation of the "except" clause. Neither holds up to scrutiny because the first relies on the inapplicable canon of *noscitur a sociis* and the second wrongly presumes that a word's meaning should always be limited to the subject matter of other words in the same sentence.

First, the government emphasizes that "any other provision of law" is one-half of the phrase "by this subsection or by any other provision of law." U.S. Br. 17-18. Because the narrow phrase "this subsection" refers to section 924(c), which concerns possessing, brandishing, or discharging a firearm in furtherance of a drug-trafficking or violent crime, the government argues that the broad phrase "any other provision of law" should be limited to laws concerning

that same conduct. *Id. Second*, the government relies on a *non sequitur* from *United States v. Villa*, 589 F.3d 1334 (10th Cir. 2009), *petition for cert. filed* (U.S. May 26, 2010) (No. 09-1445). U.S. Br. 18. The government argues there is no "'linguistic or contextual demarcation'" between the "except" clause and the specific types of conduct that section 924(c)(1)(A) criminalizes. *Id.* (quoting *Villa*, 589 F.3d at 1343). The government therefore concludes, like *Villa*, that only greater minimum sentences for "possessing, using, or carrying" a firearm in furtherance of a drug-trafficking or violent crime will trigger the "except" clause. *Id.*

The government bases its first argument on the general idea that a word should be "given more precise content by the neighboring words with which it is associated," relying on *United States v. Williams*, 553 U.S. 285 (2008), and *Dolan v. USPS*, 546 U.S. 481 (2006). U.S. Br. 17-18 (internal quotation marks omitted). This general idea is better known as the "canon of *noscitur a sociis*." *Williams*, 553 U.S. at 294.

In *Williams*, the Court construed not a two-part phrase such as "by this subsection or by any other provision of law" but a five-item list containing the verbs "advertises, promotes, presents, distributes, or solicits." *Id.* According to the Court, the verbs "promotes" and "presents" are "susceptible of multiple and wide-ranging meanings." *Id.* Applying *noscitur a sociis* to resolve this ambiguity, the Court held that "promotes" and "presents" have "a transactional connotation" like the list's other verbs. *Id.*

Similarly, in *Dolan*, the Court applied *noscitur a sociis* to the phrase "loss, miscarriage, or negligent transmission of letters or postal matter." *Dolan*, 546 U.S. at 485. The Court did so to resolve a facial ambiguity in the phrase "negligent transmission." *Id.* at 486. While that phrase "could embrace a wide range of negligent acts," the Court said, the terms "loss" and "miscarriage" refer to "failings in the postal obligation to deliver mail in a timely manner to the right address." *Id.* at 486-87. The Court concluded it would be "odd" if "negligent transmission," with those two terms preceding it, meant something entirely different. *Id.* at 487.

A canon's existence does not command its application. *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). Petitioner has already explained why *noscitur a sociis* does not apply to "by this subsection or by any other provision of law." *See* Pet. Br. 25-28. Simply reciting the canon, without naming it, the government neither confronts Petitioner's arguments nor explains why the meaning of the unambiguous phrase "any other provision of law" should be significantly narrowed by its proximity to the phrase "this subsection." Rather, as predicted, the government mistakenly "assume[s] that pairing a broad statutory term with a narrow one shrinks the broad one." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006).

The simple, expansive phrase "by this subsection or by any other provision of law" is nothing like the compound lists in *Williams* and *Dolan*. Those lists

contained not one but multiple terms preceding the term in question; and, when multiple terms in a list all point to one particular meaning, it would be odd for a subsequent term to have a different meaning. The two-part phrase "by this subsection or by any other provision of law," in comparison, is "too short to be particularly illuminating," and each part is "quite distinct from the other." *See Graham County Soil & Water Conservation Dist. v. United States*, 130 S. Ct. 1396, 1403 (2010). Unlike the ambiguous terms in *Williams* and *Dolan*, "any other provision of law" also is not susceptible to multiple meanings. *See Beaty*, 129 S. Ct. at 2189.

As for the government's second argument, its premise is sound so far as it goes, but its conclusion does not follow. The government does not explain why the absence of some "'linguistic or contextual demarcation'" compels the conclusion that "any other provision of law" is limited to laws concerning possessing, brandishing, or discharging a firearm in furtherance of a drug-trafficking or violent crime. U.S. Br. 18 (quoting *Villa*, 589 F.3d at 1343). The argument simply presumes that, because "any other provision of law" undeniably appears in section 924(c)(1)(A)'s single, fluid sentence, it must be limited to laws for violating section 924(c).

Were this presumption correct, words would always be limited in meaning to the subject matter of the sentences containing them. But they are not. The Court, at the government's urging, rejected this very sort of presumption in *United States v. Gonzales*, 520

U.S. 1 (1997). The issue there was whether section 924(c)'s phrase "any other term of imprisonment" means federal and state prison terms or only federal terms. *Id.* at 5. Advocating an expansive meaning, the government argued "the ordinary understanding of the inclusive word 'any' is broad." U.S. Br. 12, *Gonzales*, No. 95-1605 (internal citations and quotation marks omitted). It further argued the "term 'any' imports no restriction or limit[ation], and accordingly it ordinarily leaves no doubt as to the Congressional intention to include all members of the category identified by the enactment." *Id.* (internal citations and quotation marks omitted). The government thus disputed that "any other term of imprisonment" means federal prison terms simply because section 924(c) concerns federal sentencing. *Id.* at 14. The Court agreed and held that "any other term of imprisonment" means both federal and state prison terms. *Gonzales*, 520 U.S. at 5.

Unlike Petitioner, therefore, the government lacks any sound or consistent textual basis for its interpretation of the "except" clause. Based on the most natural reading of the clause's entire text, the clause precludes section 924(c)(1)(A)'s sentence if one of the defendant's counts of conviction requires the district court to impose a greater minimum sentence under any federal statute applicable at sentencing. The clause is not triggered by state statutes' minimum sentences, which do not apply to a defendant at a federal sentencing.

Even if the Court were inclined to adopt some sort of narrowed construction of "any other provision of law" – which is not, contrary to the government's assertions (U.S. Br. 14-15), the sort of interpretation Petitioner primarily advocates – the government has not even presented the best one. As Petitioner has explained, section 924(c)(1)(A), as a whole and in context, would better yield the conclusion that "any other provision of law" at least refers to statutes providing a minimum sentence for predicate drug-trafficking or violent crimes. Pet. Br. 23-24. Here, the district court determined that 21 U.S.C. §§ 841(b)(1)(A) and 846 required a greater, 10-year minimum sentence for Petitioner's drug-trafficking crime. Under the "except" clause's most natural reading or the best alternative interpretation, that 10-year sentence triggered the "except" clause and exempted Petitioner from section 924(c)(1)(A)'s 5-year sentence.

II. SECTION 924(c)'S HISTORY AND SUPPOSED ANOMALIES DO NOT JUSTIFY THE GOVERNMENT'S INTERPRETATION.

Lacking a sound textual basis for its interpretation, the government turns to drafting history, legislative history, and threats of supposed anomalies. Based on section 924(c)'s general purpose, the government also essentially requests that all words and phrases in the statute be construed against defendants. These collateral attacks on section 924(c)(1)(A)'s plain meaning have no merit.

A. Section 924(c)'s drafting history supports Petitioner's interpretation, not the government's.

The government suggests that Congress amended section 924(c) to include the "except" clause primarily to account for section 3559(c)'s mandatory life sentence and secondarily as a "safety valve" in case a future Congress enacts a law impacting the sentence for a section 924(c) violation without saying it is doing so. *See* U.S. Br. 18-21. Although statutes impacting a section 924(c) count of conviction will (along with others) trigger the "except" clause, neither prong of this narrow justification plausibly explains Congress's purpose for adding it. The first envisions Congress's setting out primarily to harmonize section 924(c) with section 3559(c) even though those statutes had worked together for four years without this clause in place. The second presumes a future Congress's incompetence to legislate in the face of existing statutes.

According to the government, Congress added the "except" clause to provide an "instruction on how the amended Section 924(c) was intended to interact with other, existing provisions such as Section 3559(c)." *Id.* at 21. Regardless of whether Congress could have had section 3559(c) in mind when adding the "except" clause, this effort to support the government's interpretation falls flat.

Even before the "except" clause was added in November 1998, section 3559(c) required district

courts to impose a life sentence for section 924(c) violations by certain defendants. *See, e.g., United States v. Boone*, No. 97-4094, 1998 WL 398782, at *3 (4th Cir. July 9, 1998). Section 3559(c), enacted in 1994, has always mandated a life sentence for a "serious violent felony" committed by a defendant with at least two prior convictions for serious violent felonies. 18 U.S.C. § 3559(c)(1) (1994). And this sentence has always applied "[n]otwithstanding any other provision of law." *Id.* Likewise, section 3559(c) has always defined "serious violent felony" to include "firearms use," which "means an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon." § 3559(c)(2)(D), (F)(i). Congress updated this definition in 1998 to include "firearms possession (as described in section 924(c))." Pub. L. No. 105-386, 112 Stat. 3469 (1998). It did so in the same legislation in which it amended section 924(c) to add the "except" clause and to criminalize firearms possession in response to *Bailey v. United States*, 516 U.S. 137 (1995). *See id.*

"When Congress acts to amend a statute, [the Court] presume[s] it intends its amendment to have real and substantial effect" and "not just to state an already existing rule." *Stone v. INS*, 514 U.S. 386, 397 (1995). Congress presumably does not engage in "exercise[s] in futility" by amending statutes to make them do what they already did. *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003).

Because courts were already required to sentence defendants with at least two prior convictions for serious violent felonies to life, "there would have been no reason for Congress to have" enacted the "except" clause in 1998 simply to effectuate that requirement – and certainly no basis to believe Congress had in mind *only* section 3559(c), among all existing statutes providing mandatory minimum sentences. *See Stone*, 514 U.S. at 397. The suggestion that the clause was added primarily to link section 924(c) with section 3559(c) "cannot be the proper understanding of the statute." *Pierce County*, 537 U.S. at 145. Even without the "except" clause, district courts would be required to substitute section 3559(c)'s life sentence for section 924(c)'s sentence for defendants with the requisite prior convictions who possessed, brandished, or discharged a firearm in furtherance of a drug-trafficking or violent crime. *See* 18 U.S.C. § 3559(c)(1) (mandating a life sentence "[n]otwithstanding any other provision of law"). And if the 1998 amendments were designed to account primarily for section 3559(c), Congress most plausibly would have drafted the "except" clause to refer specifically to a greater minimum sentence provided by "section 3559(c)," not generally to a greater minimum sentence provided by "any other provision of law." *Cf. Nijhawan v. Holder*, 129 S. Ct. 2294, 2301-02 (2009), *discussed in* Pet. Br. 22-23.

Faced with this, the government argues that Congress enacted the "except" clause not only to account for section 3559(c) but also as a "safety valve"

in case "future statutory provisions ... impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)." U.S. Br. 21 (internal quotation marks omitted). Petitioner has already highlighted this argument's multiple, fatal flaws. Pet. Br. 20-24. Section 3559(c)'s drafting history itself illustrates one of them.

The government never explains why Congress would (i) preemptively enact the broad phrase "any other provision of law" to protect against the chance that future legislation might provide a greater minimum sentence for violating section 924(c) rather than (ii) amend section 924(c) to refer specifically to the new statute when it is enacted. Pet. Br. 20-21. In fact, section 3559(c)'s drafting history suggests Congress would do the latter. When Congress amended section 924(c) to criminalize firearms possession, it also amended section 3559(c) to refer specifically to and include "firearms possession (as described in section 924(c))" – without any need for the "except" clause to link these statutes. Congress knows the relationship between statutes and will enact parallel amendments when necessary, rather than pass laws preemptively and blind to changes that a future Congress may or may not enact.

Congress did not add the "except" clause only or even primarily to account for section 3559(c)'s life sentence or other greater minimum sentences that could be enacted in the future. *Cf. Nijhawan*, 129 S. Ct. at 2301-02. Rather, Congress added the clause to moderate section 924(c)'s expansion in 1998 by

precluding the otherwise applicable section 924(c) sentence when "any other provision of law" will require a defendant to serve a greater minimum sentence. Pet. Br. 15-18. Only this interpretation gives the clause "real and substantial effect." *See Stone*, 514 U.S. at 397.

B. Section 924(c)'s general purpose does not conflict with Petitioner's interpretation of the "except" clause's particular purpose.

The government argues that "construing the 'except' clause to refer to higher mandatory minimum sentences for the Section 924(c) offense but not for other counts of conviction" furthers section 924(c)'s general purpose. U.S. Br. 27-28. According to the government, that purpose is to deter possessing or using a firearm in furtherance of a drug-trafficking or violent crime by imposing a hefty, additional sentence running consecutively to sentences for other offenses. *Id.* at 28-29. The government purports to find support for this position in section 924(c)(1)(A)'s text and legislative history.

As an initial matter, section 924(c) does not have the purpose of always requiring a consecutive, additional sentence. The government need not bring a charge for a predicate (or any other) offense when charging a defendant with a section 924(c) violation. Defendants can be – and are – charged with section 924(c) as a stand-alone offense. *E.g., United States v.*

Hunter, 887 F.2d 1001, 1003 (9th Cir. 1989). In those cases, assuming no other count of conviction, there is no other sentence to which a section 924(c) sentence can be added or run consecutively.

At any rate, the government is, in essence, seeking a rule of construction requiring that all of section 924(c)(1)(A)'s words and phrases be construed against defendants to require the most severe sentence possible. But "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). While section 924(c)(1)(A) generally requires courts to impose additional, consecutive sentences, the "except" clause limits the scope of section 924(c)'s general requirements. "[N]o legislation pursues its purposes at all costs." *Id.* at 525. By enacting the "except" clause, Congress guaranteed that section 924(c) does not pursue maximal punishment "at all costs."

The relevant inquiry is not the general purpose of section 924(c), under which defendants are frequently sentenced, but the particular purpose of the "except" clause. The government argues the "except" clause was designed to establish a link between section 3559(c) and section 924(c) and to protect against the possibility of future, greater minimum sentences. As Petitioner explained above, neither purported purpose can fully or adequately explain the "except" clause's enactment.

The only clear purpose is this: The "except" clause ensures that defendants who further drug-trafficking or violent crimes by possessing firearms will be imprisoned for at least 5 years no matter what else they are charged with. Pet. Br. 16-18. The clause's text, including the broad meaning of "any other provision of law," makes clear that this purpose is served when a defendant is subject to a minimum sentence of more than 5 years for any count of conviction.

Petitioner's interpretation hardly leaves defendants with minor sentences. With just one exception, when a greater minimum sentence triggers the "except" clause, a defendant will be sentenced to at least 10 years' imprisonment. To trigger the clause, a count of conviction must carry a minimum sentence (and many offenses do not), and that sentence must be "greater" than the otherwise applicable minimum sentence provided by section 924(c)(1)(A). Section 924(c)(1)(A)'s lowest minimum sentence is 5 years for possession. Thus, only a minimum sentence that is greater than 5 years could possibly trigger the clause. Except for section 924(c)(1)(A)'s 7-year mandatory minimum sentence for brandishing, every mandatory minimum sentence in the U.S. Code that is greater than 5 years requires 10 or more years' imprisonment. *See* U.S. Sentencing Comm'n, *Overview of Statutory Mandatory Minimum Sentencing* App. A (2009), *available at* http:www.ussc.gov/MANMIN/man_min.pdf; Families Against Mandatory Minimums, *Federal Mandatory Minimums* (last updated

Feb. 23, 2010), http://www.famm.org/Repository/Files/FEDERAL%20MANDATORY%20MINIMUMS%202.23.10.doc.

In disputing the "except" clause's clear purpose, the government argues that Congress would have made section 924(c)'s sentences run concurrently, not consecutively, to sentences for other offenses if it intended to ensure a certain number of years' imprisonment for all of a defendant's crimes. U.S. Br. 35. This overlooks that, by design, section 924(c) requires a consecutive sentence *except* when another provision of law requires a greater *minimum* sentence for another count of conviction (or when a defendant is only convicted under section 924(c)). In all other circumstances, Congress intended that a defendant receive a consecutive sentence. That could not be achieved if section 924(c)'s sentences always ran concurrently. Petitioner's interpretation, unlike the government's counterfactual scenario, meshes with this statutory design (as well as with section 924(c)(1)(D)(ii)'s operation, *see* Pet. Br. 33-34).

Finally, in relying on section 924(c)'s legislative history (*see* U.S. Br. 47-48), the government ignores that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). "Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting [Congress's] understanding of otherwise ambiguous terms." *Id.*

Here, the statutory text is not ambiguous, and, in any event, the legislative history on which the government relies does not support its interpretation. The cited history concerns section 924(c)'s general purpose, not the "except" clause's particular purpose. The government has not presented any legislative history about the "except" clause itself. "Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances." *United States v. Locke*, 471 U.S. 84, 95-96 (1985) (internal quotation marks omitted). Where legislative history does not even speak to the statutory language at issue, it is a misstep to be avoided entirely.

C. Petitioner's interpretation would not result in anomalies.

The government wrongly argues that Petitioner's interpretation would result in three supposed anomalies: (i) some defendants would receive a conviction without a sentence; (ii) some defendants would receive lesser sentences than more culpable defendants; and (iii) the government would have discretion to determine the sentence for a section 924(c) offense. U.S. Br. 39-47. In fact, none of these is an anomaly that would result from Petitioner's interpretation.

First, a conviction without a sentence is not unheard of. Defendants often receive convictions but no sentences for lesser-included offenses. Section 924(c) itself provides an example, directly contrary to

the government's assertion that "a Section 924(c) conviction for which the defendant receives no sentence whatsoever" "is highly anomalous." U.S. Br. 40. When a defendant is convicted of violating section 924(c)(1)(A), the defendant could also be convicted of violating section 924(c)(1)(B) if the firearm was a machinegun or one of a number of particular weapons. 18 U.S.C. § 924(c)(1)(B); *see generally United States v. O'Brien*, 130 S. Ct. 2169 (2010). The section 924(c)(1)(A) conviction in that scenario should "receive[ ] no sentence whatsoever." As a practical matter, moreover, defendants often serve concurrent sentences for multiple convictions, which effectively impose only the longest sentence and leave the other convictions unsentenced.

Second, as Petitioner has explained, the hypothetical comparing one certain defendant to another, less culpable defendant does not illustrate an actual sentencing outcome. Pet. Br. 31-32. It compares the *minimum* sentences the defendants would face, not a determinate or maximum term to which each may be sentenced by statute or under the U.S. Sentencing Guidelines. *Id.*; *see* U.S. Br. 40-41. To account for the firearms use, the district court could increase the sentence the more culpable defendant received for the underlying drug crime. Pet. Br. 29-32. The district court could apply an enhancement recommended by the Guidelines for firearms use in connection with a drug crime or could depart upward from the recommended sentencing range. *Id.* at 30. Before the Court's decision in *United States v. Booker*, 543 U.S.

220 (2005), the Guidelines would require the district court in the government's hypothetical to enhance the sentence for the firearms use. Pet. Br. 30-31. And, of course, upward departures were permitted even before *Booker*. *United States v. Granderson*, 511 U.S. 39, 49 n.7 (1994).

Attempting to downplay the district court's ability in the hypothetical to increase the more culpable defendant's sentence for the drug crime, the government argues that mandatory sentences "are designed specifically to limit a judge's sentencing discretion." U.S. Br. 44. That is only half-right – and it misses the point. Mandatory minimum sentences limit a district court's discretion to go *down*, not *up*. *See generally McMillan v. Pennsylvania*, 477 U.S. 79, 81-82 (1986).

The government also tries to downplay the Guidelines' role in its hypothetical. It argues that section 924(c)(1)(A)'s sentences apply despite any statutory enhancement for a drug-trafficking or violent crime. U.S. Br. 28, 45-46. According to the government, if Congress rejected the view that a predicate offense's statutory enhancements provide sufficient punishment for violating section 924(c), it follows that "Congress did not consider firearm-related Guidelines enhancements to be an adequate substitute" for the statute's minimum penalties. *Id.* at 45. This argument misconstrues the role of Guidelines' enhancements. They are not substitutes for section 924(c)'s sentences. Rather, they apply only if – based, for example, on the operation of section

924(c)(1)(A) itself – those sentences do *not* apply. *E.g.*, U.S. Sentencing Guidelines § 2K2.4 cmt. n.4 (2009). The "substitute" for a section 924(c) sentence is the greater minimum sentence provided by another provision of law. Section 924(c)(1)(A)'s enacted text makes clear that Congress considered that greater minimum sentence to generally be sufficient punishment.

Third, the government relies on *Deal v. United States*, 508 U.S. 129 (1993), which is inapposite to the issue now before the Court. There, the Court addressed a prior version of section 924(c), which provided that "in the case of [a] second or subsequent conviction" for using or carrying a firearm in furtherance of a violent crime, a defendant "shall be sentenced to imprisonment for twenty years." *Deal*, 508 U.S. at 130. This was a mandatory sentence, not a mandatory *minimum* sentence.

At issue in *Deal* was whether "conviction" refers to "the finding of guilt by a judge or jury" or "the entry of a final judgment of conviction." *Id.* at 132. Applying the statute's plain text, the Court held that "conviction" refers to the finding of guilt. *Id.* at 132-33. The Court added that interpreting "conviction" contrary to this plain meaning as "the entry of a final judgment of conviction" would make the mandatory sentence's applicability turn on whether a prosecutor charged and tried a defendant in separate prosecutions or under a multicount indictment. *Id.* at 133-34. Under that interpretation, trying a defendant in separate prosecutions would trigger the 20-year

sentence by resulting in multiple "convictions," while trying a defendant under a multicount indictment would result in one "conviction" and not require that sentence. *Id.* This troubled the Court because it would "confer the extraordinary new power to determine the punishment for a charged offense by simply modifying the manner of charging." *Id.* at 134 n.2 (emphasis removed).

Here, however, Petitioner's interpretation would not give the government the power to determine punishment. Unlike the mandatory sentence in *Deal*, section 924(c)(1)(A)'s sentences are only mandatory minimums. The district court decides the actual sentencing outcome. It may impose a sentence above the minimum when section 924(c)(1)(A)'s sentence applies or increase another count of conviction's sentence when section 924(c)(1)(A)'s sentence does not apply. The government can at most influence the sentence. By comparison, in *Deal*'s scenario, because the 20-year mandatory sentence *was the sentence*, the prosecutor's charging decisions would determine whether a defendant would be guaranteed to receive 20 years. Further, while the government asserts that Petitioner's interpretation would give prosecutors too much discretion, the government ignores that deciding whether to charge section 924(c) is one of the ultimate and most frequent exercises of prosecutorial discretion – often fixing a substantial floor (but not ceiling) on the defendant's total sentence – and could sometimes be abused. *See United States v. Sterling*, 555 F.3d 452, 454 (5th Cir. 2009).

Regardless, hypothesized anomalies cannot override the "except" clause's plain meaning. Notably, the government does not contend that these supposed anomalies constitute absurdities. *See* U.S. Br. 43; *Clinton v. City of New York*, 524 U.S. 417, 429 (1998). Even in *Deal*, the Court identified an anomaly to support, not controvert, a term's plain meaning. If any anomalies existed here, they would be "the product of the law Congress has written." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2199-2200 (2010). As the Court recently explained, "[i]t is not for [the Court] to rewrite the statute so that it covers only what [the Court] think[s] is necessary to achieve what [the Court] think[s] Congress really intended." *Id.* at 2200. "[I]t is not [the Court's] task to assess the consequences of each [interpretation] and adopt the one that produces the least mischief." *Id.* The Court's "charge is to give effect to the law Congress enacted." *Id.* "If that effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Id.*

D. The Court did not address, much less decide, the "except" clause's meaning in *United States v. O'Brien*.

The government suggests that the issue presented in this case was actually decided last term in *O'Brien*. The government quotes statements from *O'Brien* about substantive changes to section 924(c) by the 1998 amendments that also added the "except" clause. U.S. Br. 47-48. According to *O'Brien*, Congress made "two substantive changes" but otherwise "left

the substance of the statute unchanged." *O'Brien*, 130 S. Ct. at 2179. The Court did not list the "except" clause as one of those two changes. *See id.* at 2179. Exploiting this, the government suggests the Court has already rejected the view that the "except" clause substantively changed section 924(c).

But *O'Brien* did not even concern this clause. The issue there was whether, after the 1998 amendments to section 924(c), possession of a machinegun is a sentencing factor or an element of an offense. *Id.* at 2172. At no point did the Court address the "except" clause or have reason to do so: The petitioner did not present it as an issue, and the parties and *amici curiae* did not brief why it was added. *See, e.g.*, U.S. Br. 16 n.3, *O'Brien*, No. 08-1569 (noting the "except" clause's meaning was the subject of other cases).

"Appellate courts generally do not reach out to decide issues not raised by the appellant." *Cone v. Bell*, 129 S. Ct. 1769, 1790 (2009). "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions ... are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted). *O'Brien*'s statements about section 924(c)'s substantive changes, therefore, do not resolve or even bear on the "except" clause's proper interpretation. *Id.*; *see also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478 (2006). As Petitioner has demonstrated in this case,

which squarely presents the issue, the "except" clause substantively changed section 924(c).

III. THE COURT SHOULD, AT THE VERY LEAST, ADOPT PETITIONER'S INTERPRETATION BASED ON THE RULE OF LENITY.

The "except" clause's plain language provides that section 924(c)(1)(A)'s 5-year minimum sentence does not apply when "any other provision of law" requires a greater minimum sentence for any count of conviction at sentencing. Even if the plain language did not compel this interpretation, it would at least be reasonable and should be adopted under the rule of lenity. Pet. Br. 36-40. The government responds that this rule does not apply because the clause is not grievously ambiguous. U.S. Br. 48-50. According to the government, the text, context, purpose, and history all indicate the 5-year sentence will apply unless another law requires a greater minimum sentence for violating section 924(c). *Id.* at 49.

This ignores the Court's recent application of the rule of lenity based on simple "'ambiguity.'" *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). In any event, the "except" clause's meaning is clear – just not in the way the government suggests. Further, as shown above, the text, context, purpose, and history, considered together or alone, provide no indication the government's interpretation is correct.

And, even if that interpretation were "reasonable," which it is not, it would not be the only "unambiguously correct" interpretation. *Granderson*, 511 U.S. at 54.

Petitioner's interpretation should, at the very least, prevail under the rule of lenity.

CONCLUSION

The Court should reverse the Fifth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 09-479 and 09-7073

IN THE

Supreme Court of the United States

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v.

UNITED STATES OF AMERICA,

Respondent.

CARLOS RASHAD GOULD,

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On Writs of Certiorari to the United States Courts of Appeals for the Third and Fifth Circuits

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Title 18 U.S.C. § 924(c)(1)(a) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or * * * in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is * * * provided * * * by any other provision of law." The questions presented are:

1. Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence?

2. If not, does it include another offense for possessing the same firearm in the same transaction?

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Respondent.

On Writs of Certiorari
to the United States Courts of Appeals
for the Third and Fifth Circuits

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioners.[1] The ABA

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any

requests this Court to hold that under the plain language of § 924(c), a defendant is exempt from the mandatory minimum sentences provided in § 924(c)(1)(A) if that defendant receives a higher mandatory minimum sentence either under another subsection of § 924(c) or under any other provision of law.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions. It includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2]

Since the ABA's inception, and as one of the cornerstones of its mission, the ABA has "work[ed] for just laws, including human rights, and a fair legal process."[3] The ABA Standards for Criminal Justice are among the ABA's most prominent efforts to improve the criminal justice system, including sentencing. Begun in 1964 under then-ABA President (and later Associate Justice) Lewis F. Powell, Jr., the ABA Standards were originally

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party, and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, available at http://www.abanet.org/about/goals.html.

published in 17 volumes, separated by topical area.[4] When the first full edition of the *ABA Standards* was issued, Chief Justice Burger called them "a balanced, practical work designed to walk the fine line between the protection of society and the protection of the constitutional rights of accused individuals." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251-52 (1974).[5] The ABA has continued to develop and refine these Standards over the ensuing 42 years through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public, and other groups that have special interests in the subject, as well as the diverse general membership of the ABA.[6]

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[4] A history of the development of the ABA Standards is available at http://www.abanet.org/crimjust/standards/home.html. See also Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14-15 (Winter 2009) (describing the careful and balanced process by which the ABA Standards are developed and promulgated), which is available at the same website.

[5] The ABA Standards became official ABA policy only after they were approved by vote of the ABA's House of Delegates ("HOD"). The HOD is composed of more than 500 representatives from States and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Standards have been amended over the years by the same process. See *ABA General Information*, available at http://www.abanet.org/leadership/delegates.html.

[6] The ABA Standards have been referred to and adopted by courts, legislatures, and executive branch enforcement agencies. This Court has taken note of the ABA Standards when considering issues of criminal justice as well. See, *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003); *Buchanan* v. *Kentucky*, 483 U.S. 402, 418 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 440-41 (1986); *Spaziano* v. *Florida*, 468 U.S. 447, 463 n.8 (1984); *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

Most recently, in response to Justice Anthony Kennedy's address to the ABA at its 2003 annual meeting, the ABA formed the Justice Kennedy Commission to investigate the state of the criminal justice system in the United States, including criminal sentencing, and to make recommendations for improvement. The Commission presented its report (the "*Kennedy Commission Report*") to the ABA House of Delegates at its 2004 annual meeting, where its recommendations were adopted as ABA policy.[7]

The issue in this case—how the "except" clause ("Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law") of 18 U.S.C. § 924(c)[8] is to be applied to

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[7] While the report bears Justice Kennedy's name, Justice Kennedy did not participate in the work of the Commission, nor did Justice Kennedy endorse or otherwise approve the positions taken in the report. The *Kennedy Commission Report* is available through the ABA's website: http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

[8] Section 924(c)(1)(A) of Title 18 of the United States Code, in full, provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
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> (i) be sentenced to a term of imprisonment of not less than 5 years;

the mandatory minimum sentences set out in that statute—lies at the core of many policies articulated in the *ABA Standards* and the *Kennedy Commission Report*. These include the ABA's long-standing position that, while the use of a firearm in the commission of a crime should result in serious punishment, the resulting sentence should be no longer than necessary to serve society's goals and that judicial discretion must be retained throughout the sentencing process. The ABA believes that Congress struck the appropriate balance, reflected in that position, when it included the "except" clause in the 1998 amendments to § 924(c). The ABA respectfully suggests that its views on this issue, which are based on the perspectives of a broad range of practitioners and others who are involved with sentencing issues, will be of assistance to the Court in considering the question of statutory construction now before it.

SUMMARY OF ARGUMENT

In the 1998 amendments to § 924(c), Congress introduced an exception—commonly referred to as the "except" clause—to the required mandatory minimum sentences of § 924(c). Petitioners assert that, pursuant to the "except" clause, the mandatory minimums of § 924(c)(1)(A) are applicable except to the extent that a greater minimum sentence is "otherwise provided by this subsection or by any other provision of law."

The ABA supports petitioners' construction because—even apart from its fidelity to the plain language of the statutory text—it properly aligns § 924(c) with the con-

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(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

sensus view of the legal profession at the time of the 1998 amendments. When § 924(c) was enacted in 1968, it included judicial discretion to set the applicable mandatory consecutive sentence within stated ranges of years. This kind of "stacking" was not inconsistent with the legal profession's consensus views at that time. By 1998, however, judicial discretion to determine a sentence within a range of years had been replaced by the requirement to "stack" the applicable flat sentence on top of the mandatory minimum sentence contained in the other provision. During the same period, the consensus of the legal profession had hardened against mandatory minimum sentences, especially when "stacking" could result in overly harsh sentencing. The "except" clause of the 1998 amendments, accordingly, reflects a move toward the consensus, rejecting "stacking" where the subsection or another provision of law provided a mandatory minimum sentence that exceeded the minimum sentence provided in § 924(c)(1)(A), and restoring discretion so that judges could impose a sentence of greater severity under the other mandatory minimum sentence when warranted by the specific offense and offender.

Petitioners' construction of § 924(c), accordingly, remains faithful to Congress's intent to impose a harsh penalty for a crime of violence or drug trafficking involving firearms that is at least the minimum required under § 924(c), while allowing courts to impose a greater sentence that "is otherwise provided by § 924(c) or any other provision of law," where warranted to achieve society's purposes.

ARGUMENT

The "Except" Clause Aligns §924(c) With Congressional Intent To Treat Applicable Crimes Severely And With The Consensus View Of The Legal Profession At The Time Of The 1998 Amendments.

Petitioners assert that, under the plain language of §924(c), a defendant is exempt from the mandatory minimum sentences provided in §924(c)(1)(A) if that defendant receives a higher mandatory minimum sentence either under another subsection of §924(c) or under any other provision of law.[9] The ABA supports this construction because it is not only faithful to the statute's text, but also aligns §924(c) with Congressional intent to treat drug crimes and crimes of violence that involve firearms seriously and with the legal profession's views on sentencing issues at the time of the 1998 amendments.

Petitioners construe §924(c) to say "what it means and mean[] * * * what it says." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 254 (1992). As they explain, the "except" clause does not eliminate the mandatory minimum sentences set out in §924(c). Rather, by giving meaning to all of the language in §924(c), it ensures that possession or use, in any manner, of a firearm in connection with a crime of violence or a drug trafficking crime shall result in sufficiently serious punishment, while eliminating mandatory "stacking" of minimum sentences only where stacking would result in a sentence that is more than double the pertinent mandatory minimum set out in §924(c).

This construction reflects the legal profession's consensus in 1998 regarding the propriety of mandatory minimum sentences and sentencing policy generally.

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[9] Section 924(c) is quoted in note 8, *supra*.

While the "except" clause did not eliminate mandatory minimum sentences, it nevertheless restored the element of judicial discretion (obedient, of course, to the dictates of other applicable statutes containing mandatory minimum sentences and the then-mandatory sentencing guidelines) to ensure that the sentence imposed is the sentence necessary to achieve society's goals.

A. Petitioners' Construction Is Consistent With The Legal Profession's Consensus In 1998, As Reflected In ABA Policies And Other Secondary Sources.

When Congress passed the Gun Control Act of 1968, P.L. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 *et seq.*) (the "Act"), § 924(c) required courts to stack the applicable mandatory minimum sentence on top of a defendant's sentence for a predicate felony.[10] At that time, the mandatory minimum sentence was stated as a range of "not less than one year nor more than ten years" for a first qualifying conviction, and a term of "not less than two years nor more than twenty-five years" for a second or subsequent qualifying conviction. This was not inconsistent with the consensus of the legal community at that time, since § 924(c) required the courts to determine the number of years within these ranges that were to be imposed. For example, Standard 18-2.2 of the *ABA Standards for Criminal Justice. Sentencing Alter-*

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[10] As codified in 1968, § 924(c) stated:

> (c) Whoever—
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> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
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> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
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> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

natives and Procedures (1st ed. 1968) ("*1968 Standards*"), provided, "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."[11] App., *infra*, 19a.

However, even in 1968, the legal profession was concerned with mandatory minimum sentences: Standard 18-3.2(a) of the *1968 Standards* cautioned that it was generally "unsound for the legislature to require that the court impose a minimum period of imprisonment." App., *infra*, 19a. The second edition of the *ABA Sentencing Standards* ("*1980 Standards*") repeated this caution in Standard 18-4.3(a). App., *infra*, 16a.

By the time the third edition of the *ABA Sentencing Standards* was published in 1994 (the "*1994 Standards*"), § 924(c) required a flat five, ten or thirty year consecutive sentence, based on the type of weapon, for the first qualifying conviction and higher flat sentences for subsequent qualifying convictions.[12] By that same time, the legal con-

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[11] This consensus was also reflected in a 1975 ABA policy in support of strengthening the Act, which stated that "the Judiciary [should] be encouraged to impose severe penalties, to the extent consistent with the American Bar Association [Standards for Criminal Justice], for the possession or use of a firearm or facsimile in the commission of a crime, as provided for by Section 924(c) of the Act." This policy was based on the conclusion that the Act was consistent with Standard 18-2.2. The *Report with Recommendation of the Section of Criminal Justice to the House of Delegates, 1975 ABA Annual Meeting*, is available from the ABA.

[12] In 1994, § 924(c)(1) stated:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United

sensus had hardened against mandatory minimums, and Standard 18-3.21(b) of the *1994 Standards* stated, "A legislature should not prescribe a minimum term of confinement for any offense." App., *infra*, 3a. This "long-standing [ABA] policy" was based on research showing that "fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the system to respond to case-specific factors." Standard 18-3.21 Commentary, App., *infra*, 7a.

By the time Congress considered the 1998 amendments to § 924(c), this conclusion was echoed in many secondary sources. See, *e.g.*, Orrin Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185 (1993) ("Hatch"); United

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States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

States Sentencing Commission, *1991 Special Report to Congress: "Mandatory Minimum Penalties in the Federal Criminal Justice System"* (the "*1991 Sentencing Commission Report*").[13]

For example, Senator Hatch noted that in 1990, Congress had "formally directed the [U.S. Sentencing Commission] to study the effectiveness of mandatory minimum sentencing," Hatch at 192, and that its findings, as well as those of the congressionally chartered Federal Courts Study Committee and the Judicial Conference had "prompted a growing number of legislators to question the merit and efficacy of mandatory minimum sentences." *Id.* at 193. Senator Hatch also stated:

> A growing tendency exists among those members of Congress most familiar with the criminal justice system to seek alternatives that are more compatible with the sentencing guidelines and with the purposes of sentencing articulated in the [Sentencing Reform Act of 1984].

Id. at 195.

Moreover, in the *1991 Sentencing Commission Report*, the United States Sentencing Commission, in reporting on the impact of mandatory minimum sentencing provisions on the federal criminal justice system and the federal prisons, summarized the positions of the Judicial Conference of the United States and the Federal Courts Study Committee, and its interviews with judges, assistant U.S. attorneys, defense attorneys, and probation officers. *1991 Sentencing Commission Report* at 54. Specifically:

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[13] The *1991 Sentencing Commission Report* is available at http://www.ussc.gov/r_congress/manmin.pdf.

- The Judicial Conference of the United States and the judges of twelve circuit courts of appeal had adopted resolutions that opposed mandatory minimums sentences, and in the Conference's formal resolution, it had urged Congress "to reconsider the wisdom of mandatory sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act." *Ibid.*
- The Federal Courts Study Committee, in its 1990 report, wrote: "Congress should repeal mandatory minimum sentence provisions[.]" *Id.* at 55.
- Of the interviews conducted, a preliminary finding was that "[a] majority of judges, panel attorneys and federal defenders are in favor of [mandatory minimum sentence] elimination and/or reduction for both drug distribution and possession of a firearm," while "[p]robation officers and especially U.S. attorneys show[ed] more support for the current system." *Id.* at 64. A second preliminary finding was that, "without exception, each of these groups would prefer [that Congress] raise sentences for individual offenses by some means other than mandatory minimum sentences." *Id.*[14]

While the ABA's *Kennedy Commission Report* was not presented until 2004, it also reflected these concerns,

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[14] The *1991 Sentencing Commission Report* also stated that the effect of mandatory minimum sentences on the federal prison population based on offenders sentenced during Fiscal Year 1990 was as much as an estimated 6,971 *additional* years of prison imposed, and between $79 million and $125 million of *additional* costs, above those attributable to the guidelines. *Id.* at 68.

as well as other social and fiscal results that were being confronted when Congress considered the 1998 amendments to § 924(c). After considering this report, the ABA adopted policy that included the following: "[T]he American Bar Association urges that states, territories and the federal government (1) Repeal mandatory minimum sentence statutes[.]" *ABA Report with Recommendation #121A* (Policy adopted Aug. 2004), available from the ABA.

This policy was based, *inter alia*, on the Commission's conclusions that mandatory minimum sentences had an overall tendency merely to shift sentencing discretion away from courts to prosecutors:

> Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.

Kennedy Commission Report at 27, citing David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 215 (2004); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentences*, 152 U. Penn. L. Rev. 33 (2003) (arguing that mandatory sentenc-

ing provisions also invade both the judge's and the jury's function). See also, Hatch at 195 ("mandatory minimums are basically a 'charge-specific' approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts"); *1991 Sentencing Commission Report* at 60 (of 46 Assistant United States Attorneys interviewed, 26 reported that they did not always charge a mandatory minimum even when it was warranted by the facts in the case).

The Justice Kennedy Commission also noted that, despite the increased number of people incarcerated and the increased costs from incarceration, it was unclear what effect increased incarceration had had on crime rates. For example, between 1991 and 2001, there was a 51.6% increase in the national incarceration rate and a 29.5% reduction in the crime rate, but in Texas, the incarceration rate rose 139% but the crime rate was reduced only by 34.1%, while in New York, the incarceration rate rose 10.9% and the crime rate was reduced by 53.2%. *Kennedy Commission Report* at 18.[15]

The Commission concluded that all sentencing options should be consistent with two principles that were at the core of the ABA's 1994 Standards: (1) unwarranted and inequitable disparities in sentencing between like offenses and offenders should be avoided; and (2) manda-

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[15] Nor did mandatory minimums ensure equal treatment of defendants. Instead, the Commission reported that statistics indicated that minority defendants were more likely to be charged with a mandatory minimum offense than whites. *Kennedy Commission Report* at 28-29 (discussing, *inter alia*, that California's "three strikes" rule had resulted in an incarceration rate for African-Americans that was 12 times higher than that for whites, while the Latino rate was 45 percent higher than that for whites).

tory minimum sentences should be avoided, so that sentencing courts may consider the unique characteristics of offenses and offenders that warrant an increase or decrease in sentence. *Kennedy Commission Report* at 26.

As reflected in the conclusions in Senator Hatch's article, the *1991 Sentencing Commission Report*, the *Kennedy Commission Report*, and the *1994 Standards*, it had become the legal profession's consensus view by 1998 that mandatory minimum sentences were neither necessary nor an appropriate means for meeting the goal of establishing serious penalties for serious crimes.

B. Petitioners' Construction Of The "Except" Clause Avoids Sentences That, As A Result Of Stacking Mandatory Minimum Sentences, Are Greater Than Necessary To Achieve Society's Goals.

Congress, of course, did not eliminate mandatory minimum sentences in the 1998 amendments. But petitioners' construction of the "except" clause is consistent with the consensus of the legal profession in 1998, as stated in the *1991 Sentencing Commission Report*, that Congress should "reconsider the wisdom of mandatory sentence statutes." *1991 Sentencing Commission Report* at 33; see also, *1994 Standards* 18-2.4, App., *infra*, 1a ("consistent with rational, civilized, and humane values," criminal sentences "authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized").

First, the "except" clause as construed by petitioners maintains harsh punishment for crimes of violence and drug trafficking crimes involving firearms, because courts can never impose a sentence that is less severe than the 5-, 7-, or 10-year sentence Congress deemed

necessary for the firearm offense. By its terms, the "except" clause is only operative where another statutory provision requires that the defendant receive "a greater minimum sentence" than the ones provided in § 924(c)(1)(A)(i)-(iii).

Second, where § 924(c) is applicable, the "except" clause as construed by petitioners recognizes that, when another minimum sentence exceeding the minimum provided by § 924(c)(1)(A) must be imposed, society's sentencing goals provide no basis on which to mandate additional punishment if those goals have been achieved already through the minimum specified for the predicate violation.[16]

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[16] Congress could not have overlooked the fact that, by 1998, the phrase "any other provision of law" would encompass myriad other laws. See, *e.g.*, Hatch at 192-193 (from 1984 to 1990, Congress enacted "an array of mandatory minimum sentences," turning "an occasional phenomenon" into "a decided trend" that resulted in "over one hundred separate mandatory minimum penalty provisions," but Congress had recently "begun to reconsider the merits of these statutes."). In 1998, the offenses carrying mandatory minimum sentences included:

10-year minimum: 21 U.S.C. § 841(b)(1)(A) (1998) (first offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances); 21 U.S.C. § 841(b)(1)(B) (1998) (second offense: manufacturing, distributing, or possessing with intent to distribute smaller amounts of certain controlled substances); 21 U.S.C. § 960(b) (1998) (first offense: unlawful import or export of narcotics); 18 U.S.C. § 2113(e) (1998) (taking hostage during bank robbery or escape from bank robbery).

20-year minimum: 21 U.S.C. § 841(b)(1)(A), (B), & (C) (1998) (first offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances, if death results); 21 U.S.C. § 841(b)(1)(A) (1998) (second or subsequent offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances); 21 U.S.C. § 848 (1998) (first offense: continuing criminal narcotics enterprise); 21 U.S.C. § 960(b) (1998) (first offense:

Finally, the "except" clause as construed by petitioners restores discretion to the judiciary to individualize a sentence that may be greater than the minimum provided by § 924(c)(1)(A), where greater severity is warranted to achieve society's purposes. It is the court that crafts the sentence so that it is "sufficient, but not greater than necessary," taking into account, among other things, "the nature and circumstances of the offense and the history and characteristics of the offender." 18 U.S.C. § 3553(a). See also *1994 Standards* 18-2.4, App., *infra*, 1a (severity), 18-3.2, App., *infra*, 1a (consideration of mitigating factors), and 18-3.3(b), App., *infra*, 2a (consideration of aggravating factors).

In short, the ABA supports petitioners' construction of § 924(c) because it is faithful to the plain language of the statute and also strikes the appropriate balance between assuring that a defendant receives warranted punishment and ensuring that the sentence, as determined by the trial court, is no more severe than necessary to achieve the societal purposes the sentence is intended to serve. As stated by the Second Circuit, it is not inconsistent with the purpose of enhancing firearms penalties for Congress to provide "a series of increased minimum sentences . . . d also to have made a reasoned judgment

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unlawful import or export of narcotics, if death results); 21 U.S.C. § 960(b) (1998) (second or subsequent offense: unlawful import or export of narcotics); 18 U.S.C. § 1121(b)(1) (1998) (murder of state correctional officer in performance of officer's duties); 18 U.S.C. § 2113(a) (1998) (bank robbery); 21 U.S.C. § 848 (1998) (murder of law enforcement officer during continuing criminal narcotics enterprise); 49 U.S.C. § 46502(a)(2) (1998) (aircraft piracy).

25-year minimum: 18 U.S.C. § 2113(e) (1998) (assault or use of dangerous weapon or device in commission of bank robbery).

30-year minimum: 21 U.S.C. § 848 (1998) (second and subsequent offenses: continuing criminal narcotics enterprise).

that where a defendant is exposed to two minimum sentences, * * * only the higher minimum should apply." *United States* v. *Whitley*, 529 F.3d 150, 155 (2d Cir. 2008). This balance also reflects the consensus of the legal profession regarding mandatory minimum sentences at the time of the 1998 amendments.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the judgments of the Third and Fifth Circuits be reversed.

Respectfully submitted.

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APPENDIX A

The *ABA Standards for Criminal Justice, Sentencing* (3d ed. 1994), provide in relevant part as follows:

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Standard 18-2.1 Severity of sentences generally

The legislature should ensure that maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized, and humane values. Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.

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Standard 18-3.2 Mitigating factors

(a) The legislature or the agency performing the intermediate function should identify factors that may mitigate the gravity of an offense or an offender's culpability in commission of the offense.

(b) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the mitigating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(c) Mitigating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(d) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider mitigating factors in determining sentences within the range and, if the factors are substantial, in departing downward from the range.

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Standard 18-3.3 Definition of offenses; aggravating factors

(a) The legislature should define offenses so that important factors determining the gravity of offenses are made elements of the offenses rather than aggravating factors to be considered only in sentencing.

(i) The legislature should categorize offenses in which an act of violence is an element separately from similar non-violent offenses so that the levels of severity of authorized and presumptive sentences are appropriate for each type of offense.

(ii) For offenses in which the gravity of the offense varies with the amount of money or quantity of goods, the legislature should differentiate offenses by including amounts or quantities as elements of the offense.

(b) The legislature or the agency performing the intermediate function should identify factors that may aggravate the gravity of an offense or an offender's culpability in commission of the offense.

(c) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the aggravating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(d) Aggravating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(e) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider aggravating factors in determining sen-

tences within the range and, if the factors are substantial, in departing upward from the range.

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Standard 18-3.21 Total confinement

(a) The legislature should authorize sentence of an individual offender to a term of total confinement.

(b) A legislature should not prescribe a minimum term of total confinement for any offense.

(c) The agency performing the intermediate function should guide courts in the appropriate use of the sanction of total confinement.

(d) The legislature should provide that individuals sentenced to total confinement be committed to the custody of the department or bureau charged with operation of the prison or jail system for the term of their confinement.

(e) The legislature should provide that individuals sentenced to total confinement receive substantial "good time" credit toward service of their sentences. The legislature should determine a specific formula for "good time" credit.

(f) The legislature should provide that the department or bureau with custody of an individual must determine the individual's release date by giving credit for:

(i) time spent in custody prior to trial or plea, during trial, pending sentence, pending appellate review, and prior to the arrival at the institution to which an offender has been committed.

(ii) time spent in custody under a prior sentence if the prior sentence has been set aside and the individual has been sentenced again for the same offense or for another offense based on the same con-

duct. In the event of a reprosecution, credit should include all time spent in custody, in accordance with paragraph (i) as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(iii) time spent in custody upon arrest on a different charge if the charge on which the individual has been sentenced grew out of conduct that occurred prior to the arrest and that time has not been credited toward another sentence.

When an individual has been sentenced to consecutive terms of total confinement, credit toward the remaining sentence should be given for time spent in custody under a sentence that has been set aside as a result of appeal or postconviction review without reprosecution or resentence for that offense or for another offense based on the same conduct.

(g) If the aggregate of total confinement sentences imposed does not satisfy the requirement of adequate determinacy in sentencing, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released. The legislature should direct the board to take into account, in setting guidelines for presumptive dates of release or in considering the release date of a specific individual, the provisions in this standard.

History of Standard

The third edition's treatment of total confinement differs in a number of ways from the prior edition's.[1] First,

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[1] *See generally* former Standards 18-2.5, 18-4.1 through 18-4.3, and 18-4.7 (2d ed. 1979).

the former Standards advocated a system of relative indeterminacy in incarcerative sentences. Former Standard 18-4.1 stated that the legislature "should exercise caution in curtailing indeterminacy" and recommended retention of an "early release mechanism independent of the sentencing court." The present Standards would allow for early release only in jurisdictions that fail to create an adequately determinate sentencing structure.[2] Further, the prior Standards retained the indeterminate device of maximum and minimum terms of total confinement, and suggested that the "proportion of indeterminacy in the sentence [should] increase as the sentence's length increases."[3] In contrast, this edition's conception of presumptive sentences does not allow for widely divergent maximum and minimum terms, and treats disparity as undesirable for sentences of all lengths.[4]

The second edition endorsed the idea of an "extended sentence" for dangerous or habitual offenders, where sufficient proof of future dangerousness was assembled.[5] The current Standards disfavor sentences based on such projections of future conduct.[6]

Former Standards 18-2.1(e) and 18-2.5(b), in black letter, expressed views concerning the appropriate overall levels of incarceration in this country, circa 1979. For this edition, the drafters believed that such issues, which change year by year, should be addressed in the

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[2] *See* Standards 18-3.21(g) and 18-2.5.

[3] Former Standards 18-4.2 (2d ed. 1979) (Maximum term); 18-4.3 (Minimum term); 18-4.1(b) (General principles; indeterminacy).

[4] *See* Standards 18-2.5 and 18-3.1.

[5] Former Standard 18-2.5(b)(i) through (v) (2d ed. 1979).

[6] *See* Standard 18-3.5 and Commentary.

Introduction and Appendix rather than in a black-letter Standard.

Paragraph (e) of this Standard, concerning good time credit, departs from the prior edition, which expressly took no position on that subject.[7]

Paragraph (f) of this Standard, regarding credits against sentences to total confinement, is a streamlined restatement of former Standard 184.7.

Related Standards

The conditions necessary for the imposition of a sanction of total confinement are set out in Standards 18-3.12(c) and 18-6.4(a). Paragraph (b) of this Standard should be read in conjunction with Standard 183.11(c).

Commentary

Paragraph (a) provides that the legislature should make the sanction of total confinement available in all cases involving an individual offender. Given the scope of this chapter, the statement in paragraph (a) is circular: As set out in Standard 18-1.1(a), the chapter does not extend to those minor offenses for which only nonincarcerative sanctions are provided.[8]

Paragraph (b) continues long-standing ABA policy that the legislature should not prescribe mandatory terms of total confinement for any offense. The length of incarceration for individual offenders is better addressed through shared efforts of the sentencing agency, which

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[7] *See* former Standard 18-4.7(g) (2d ed. 1979).

[8] The Standards' scope includes offenses typically classified as felonies and misdemeanors. Although such classifications and the relevant penalty structures differ across jurisdictions, the drafters intended the Standards to address sentencing for offenses carrying maximum incarcerative penalties of six months or more. Standard 18-1.1(a).

can consider severity issues from a systemic perspective, and sentencing courts, which can exercise individualized discretion in appropriate cases. It is a fundamental precept of the Standards that fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the system to respond to case-specific factors.[9]

Beyond this, experience with mandatory minimum terms of total confinement has demonstrated that the goal of uniformity in sentencing is ill served by such laws. There is uncontroverted evidence that prosecutors' charging discretion, the vicissitudes of the plea bargaining process, and the heightened reluctance of juries to convict when penalties are inflexibly severe, all contribute to patterns of irregular enforcement of mandatory minimum provisions.[10] A recent study of such federal laws conducted by the United States Sentencing Commission reached the further disturbing conclusion that uneven enforcement works particularly to the disadvantage of nonwhite offenders.[11] Paradoxically, in practice,

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[9] *See* Standard 18-2.6.

[10] *See* UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Special Report to Congress, August 1991) (finding a lack of uniform application and unwarranted disparity in sentencing under the more than 60 federal statutes containing mandatory minimum penalties); Michael Tonry, *Mandatory Penalties*, *in* 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., 1992) (surveying history of mandatory sentencing provisions).

[11] UNITED STATES SENTENCING COMMISSION, *supra* note 10, at ii, 76-82. On the subject of race-based and other disparities, the Commission reported:

> Disparity may be entering the federal criminal justice system through mandatory minimums in two ways: defendants who appear to be similar are charged and convicted pursuant to mandatory minimum provisions differentially depending upon

the seeming blanket uniformity of mandated terms exacerbates the worst features of disparity in the system.

One argument offered in favor of mandatory minimum sentencing laws is that they can control judicial discretion when, in the view of the legislature, the courts would otherwise be too lenient in sentencing decisions. Much of this argument evaporates, however, in the system of determinate, presumptive sentences advocated by these Standards. Presumptive sentences established by the sentencing agency, with the oversight of the legislature, set forth baseline penalty levels for all offenses. The experience in all state guidelines systems is that judges follow such guidance in the vast majority of cases. Further, as a legal matter, the courts' departure power is not unconstrained, and is subject to appellate review. Thus, systemic decisions regarding appropriate harshness of penalties can be implemented and enforced, while still leaving space for cases that demand individualized treatment.

In drafting the new edition of these Standards, the Task Force and Standards Committee recognized that most or all American jurisdictions have sentencing provisions inconsistent with the terms of paragraph (b). Indeed, the current trend appears to be in the direction of enacting *additional* mandatory minimum sentencing laws. As observed by Professor Tonry, the political and symbolic appeal of such measures can overwhelm the empirical and historic evidence that they do not serve

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such factors as race, circuit, and prosecutorial practices; and defendants who appear to be quite different with respect to distinguishing characteristics (*e.g.*, role and nature of the offense) receive similar reductions in sentences below the mandatory minimum provisions.

Id. at 89.

their expected ends.[12] For the Standards' drafters, the sharp divide between policy analysis and the current political atmosphere posed the following question: Can the ABA announce a "standard" for criminal justice that few or no jurisdictions now follow? In most settings such a concern would militate against the adoption of black-letter policy. In the case of mandatory minimums, however, the drafting groups concluded that no credible defense of such laws can be offered, and their acknowledged political and symbolic benefits do not overcome the operational defects exposed by long experience.

Paragraph (b) must be read alongside Standard 18-3.11(c), which provides: "The legislature should not mandate the use of the sanction of total confinement unless the legislature can contemplate no mitigating circumstance that would justify a less severe sanction." Standard 18-3.11(c) contemplates that for a very narrow group of crimes, the legislature may provide that *some* period of incarceration is a necessary part of the overall sentence, without fixing a required length of term. Where such commands are made, the sentencing agency and courts establish the duration of total confinement. The sentencing agency, however, would not be free to create a presumptive sentence without a component of total confinement, and the sentencing court could not fashion a departure sentence lacking any term of total confinement.

Paragraph (c) highlights the role of the sentencing agency in providing guidance to sentencing courts in the

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[12] Tonry, *supra* note 10, at 270.

appropriate use of total confinement.[13] Elsewhere the Standards explore in some detail the concerns that should influence the agency in promulgating such guidance. Many of these concerns drive judicial decision making, as well.[14] Standard 18-3.12(c) outlines necessary conditions for imposition of any term of total confinement.[15] Standard 18-3.12(a) and (b) speak more generally to policies relating to the selection of some types of sanctions over others in presumptive sentences.[16] On the issue of sentence severity, Standard 18-2.4 states that "[s]entences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized."[17] Standard 18-2.3 recognizes the factor of cost in overall confinement policy, and states that "the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and

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[13] Similar provisions exist for all other sanctions discussed in this chapter. *See* Standards 18-3.13(c) (compliance programs for individuals), 18-3.14(c) (compliance programs for organizations), 18-3.15(c) (restitution or reparation), 18-3.16(c) (fines), 18-3.17(c) (community service), 18-3.18(c) (acknowledgment sanctions), 18-3.19(c) (intermittent confinement in a facility), and 18-3.20(c) (home detention).

[14] Standard 18-6.4 traces the intellectual steps a sentencing judge should take before pronouncing a sentence that includes a term of total confinement.

[15] The conditions of Standard 18-3.12(c) are echoed in Standard 18-6.4(a).

[16] For example, Standard 18-3.12(a)(ii) states that the sentencing agency should recognize that "[s]anctions other than total confinement may serve to punish and incapacitate offenders."

[17] Sentencing courts are directed to the same precept in Standard 18-6.1(a).

jail system of the state."[18] Similarly, for states with sentencing commissions, Standard 18-4.4(c)(i) directs the legislature to require that "the commission may not promulgate sentencing provisions that will result in prison populations beyond the capacity of existing facilities unless the legislature appropriates funds for timely construction of additional facilities sufficient to accommodate the projected populations."[19]

Paragraph (d) provides that, as a matter of statutory law, individuals sentenced to total confinement should be committed to the custody of the department or bureau charged with operation of the prison or jail system. As with all other sanctions, there is a need to designate the governmental agency with ongoing responsibility for supervision of an offender during the term of his sentence. Unlike other sanctions, however, the unique degree of control associated with total confinement demands that jurisdiction over the offender be transferred from the sentencing court to correctional authorities.

Under the view of determinacy advocated by this chapter, sentences served should bear close proximity to sentences imposed.[20] Unwarranted disparities in individual punishment, and serious systemic distortions, can occur if release decisions from total confinement

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[18] Standard 18-2.3(e). This is not to say that states may not adopt confinement programs that expand existing prison and jail capacities. Such policies are permissible under these Standards so long as the legislature appropriates the necessary resources. *See* Standard 18-2.3 and Commentary.

[19] Cost concerns are best addressed on the systemic rather than the case-specific level. Thus, there is no analogue to the resource-sensitivity provisions of Standards 18-2.3 and 18-4.4 in the Standards applicable to judicial discretion.

[20] *See* Standards 18-2.5 and 18-4.4(c).

eventuate in widely divergent sentences served. Despite this concern, the Standards' drafters recognized that institutional discipline and morale require that incarcerated inmates have palpable incentive to cooperate with prison and jail officials. Paragraph (e) therefore asserts that the legislature should provide for substantial "good time" credit toward service of sentences to total confinement. While the word "substantial" is not quantified in black letter, the drafters thought that potential good time credit in the range of 15 to 25 percent would satisfy the requirement. To preserve the integrity of sentences imposed, and limit the possibility of disparate release decisions, paragraph (e) further states that the legislature should determine a specific formula for the awarding of good time credit.

Paragraph (f) addresses a panoply of situations in which the effective length of a current sentence to total confinement should be adjusted to take account of time the offender has previously served in custody. The legislature should provide that the department or bureau assuming custody of the offender make such calculations in setting a release date.

The Standards have long asserted that there should be no distinction in treatment between time served in custody before and after conviction or sentencing.[2] All incarcerative experiences of offenders stemming from the current offense should be counted toward service of any final sentence pronounced by the sentencing judge. Subparagraph (f)(i) reaffirms this view. Subparagraph (f)(ii) extends similar reasoning to circumstances in which an offender's conviction or sentence has been overturned on

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[2] *See* former Standard 18-4.7 (2d ed. 1979); former Standard 18-3.6 (1st ed. 1969).

review, but where the offender eventually receives a new sentence for the original offense conduct. Such scenarios can occur in a number of ways: A reviewing court may invalidate a sentence and remand for resentencing; alternatively, a reviewing court may invalidate a conviction and remand for further proceedings that result in reconviction for the same offense or for a different offense arising from the same criminal conduct-again presenting the offender for a resentencing. Subparagraph (f)(ii) is intended to reach the full variety of processes that can produce a new sentence for conduct that had given rise to a prior sentence.

Subparagraph (f)(iii) extends to situations where an offender has been incarcerated subsequent to the instant offense conduct, but where the custody was based on arrest for a different charge. In some cases, under subparagraph (f)(i), such periods of confinement will be credited against a total confinement sentence for the other charge. Where such credit has not been given, however, subparagraph (f)(iii) would award credit against the instant sentence. This is sensible for a number of reasons. From the offender's experiential point of view, incarceration is incarceration, regardless of the formal legal basis for its imposition at any moment in time.[2] Further, it is not unknown for pretrial detention to be predicated on charges different than those reflected in the ultimate conviction and sentence. It elevates form over substance to ignore such periods of custody, when they occur after the offense of conviction, simply because the eventual prosecution embarked in an alternate direction. Finally,

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[2] It does not make sense, on the other hand, to bestow credit for periods of incarceration that occurred before the instant offense. Such a policy would allow offenders to "bank" confinement credits against future charges.

from a public policy perspective, the purposes of sentencing are overserved if the actual length of an offender's confinement exceeds that deemed justified by the sentencing court. This is both an unnecessary use of resources and a violation of the principle of parsimony embodied in Standard 18-2.4.

The final provision of paragraph (f) applies to circumstances where an offender has been sentenced for multiple offenses and one or more of the convictions or sentences is overturned on review. In such circumstance, if that reprosecution or resentencing does not occur on the challenged counts, credit should be awarded against any remaining sentence of total confinement for convictions untouched on review. As a practical matter, this provision has import only for consecutive sentences, which are disfavored by the Standards and should occur infrequently.[13] Where multiple convictions give rise to a consolidated sentence, as recommended in Standard 18-3.7, or a concurrent sentence under traditional practice, the time served by an offender for an invalidated sentence will already have been credited against the sentence left intact on review, irrespective of the final provision of paragraph (f).

Paragraph (g) is addressed only to jurisdictions that fail to create a sentencing system that meets the basic requirement of determinacy in Standard 18-2.5. Briefly stated, that Standard defines adequate determinacy in terms of the ability of systemic actors to predict, control, and manipulate future sentencing patterns with reasonable accuracy, and in terms of the success of the system in imposing sentences that are reasonably uniform, so that unwarranted disparities in individual sentences are

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[13] *See* Standards 18-3.7, 18-6.5 and Commentary.

avoided.[24] Because the determinacy Standard is foundational to the overall functioning of the sentencing system, jurisdictions that fail to comply with Standard 18-2.5 will operate in nonconformity with the bulk of the Standards contained in this chapter.[25] Still, such jurisdictions now exist in substantial numbers. For states that adhere to the traditional system of indeterminate sentencing, or follow determinate schemes that fail to satisfy the components of Standard 18-2.5, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released.

The logic of paragraph (g) is that, where jurisdictions lack "front end" control over the use of scarce prison resources, as achieved through an effectual determinate sentencing system, recourse must instead be made to "back-end" control. Historically, adjustments to overcrowding have occurred through parole release or emergency release mechanisms. Many states today, when correctional facilities cannot support sentences imposed, must resort to such back-end measures. The Standards Committee, while clearly opposed to regimes of indeterminate sentencing,[26] recognized that, in such systems, a release authority with substantial discretion over the length of sentences served is an indispensable player in the sentencing structure.

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[24] For a fuller discussion, see Standard 18-2.5 and Commentary.

[25] On the fundamental importance of the determinacy Standard, see Standards 18-2.5, 18-2.6 and Commentary.

[26] *See* Standard 18-2.5 and Commentary.

APPENDIX B

The *ABA Standards for Criminal Justice, Sentencing* (2d ed. 1980), provide in relevant part as follows:

* * * * *

Standard 18-4.3 Minimum term.

(a) Because there are so many factors in an individual case which cannot be assessed in advance and because a guideline drafting agency can respond to changed circumstances and factual complexity with greater flexibility and precision than can the legislature, it is unsound for the legislature to prescribe a minimum or mandatory period of imprisonment.

(b) In order to mitigate the possibility of excessive severity and to preserve a meaningful system of early review, a sound sentencing structure should require the proportion of indeterminacy in the sentence to increase with the sentence's length. The following standards are recommended as boundaries on the extent of indeterminacy which is desirable:

(i) In the case of short-term sentences (*e.g.*, those having a maximum term of three years or less), little justification exists for a substantial ranges between the minimum and maximum terms, and "flat time" sentences should be authorized but not required.

(ii) In the case of intermediate-range sentences (*e.g.*, those having a maximum term between three and ten years), a "flat time" sentence should not authorized, and the margin between the minimum and maximum term should be required to increase as the maximum term imposed increases. A ceiling on the maximum degree of indeterminacy permitted within this intermediate range is also

desirable to curtail the frequency of sentences as open-ended as one to ten years and to minimize the disparity which results when offenders sentenced for offenses of moderate severity obtain early release prior to the expiration of "flat time" sentences imposed for less serious offenses; and

(iii) In the case of long-term sentences (*e.g.*, where the term imposed exceeds ten years), periodic review by the agency administering early release should being no later than the tenth year or such earlier date as would be more reasonably related to the longest minimum term recommended by guidelines adopted under subparagraph (b)(ii) above.

(c) Substantial minimum terms are generally inappropriate. Authority to impose a minimum term should be circumscribed by the following limitations:

(i) The legislature should specify for each of the categories of offenses designated pursuant to standard 18-2.1(a) the highest minimum period of confinement which can be imposed, and the guideline drafting agency should establish presumptive ranges within that limit depending on the circumstances of the offense and the offender;

(ii) Minimum sentences as long as ten years should only be employed in exceptional cases, and longer minimums should not be authorized by the legislature;

(iii) The court should not be authorized to impose a minimum sentence until a presentence report (standards 18-5.1 to 18-5.5), supplemented where necessary by report of the examination of the defendant's mental, emotional, and physical

conditions (standard 18-5.6), has been obtained and considered.

* * * * *

APPENDIX C

The *ABA Standards for Criminal Justice, Sentencing* (1st ed. 1968), provide in relevant part as follows:

* * * * *

Standard 18-2.2 General principle: judicial discretion.

The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.

* * * * *

Standard 18-3.2 Minimum term.

(a) Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself. It is likewise unsound for the legislature to condition parole eligibility upon service of a specified portion of the maximum term.

(b) While recognizing that there are in addition substantial arguments against judicial authority to select and impose minimum sentences, a majority of the Advisory Committee would support a statute which authorized but does not require the sentencing court to impose, within carefully prescribed legislative limits, a minimum sentence which must be served before an offender becomes eligible for parole.

(c) Minimum sentences are rarely appropriate, and should in all cases be reasonably short. Authority to impose a minimum term should be circumscribed by the following statutory limitations:

(i) The legislature should specify for each of the categories of offenses designated pursuant to section 2.1(a) the highest minimum period of imprisonment which can be imposed;

(ii) Minimum sentences as long as ten or fifteen years should be strictly confined to life sentences. Longer minimum sentences should not be authorized;

(iii) In order to preserve the principle of indeterminacy, the court should not be authorized to impose a minimum sentence which exceeds one-third of the maximum sentence actually imposed;

(iv) The court should not be authorized to impose a minimum sentence until a presentence report (sections 4.1-4.5), supplemented by a report of the examination of the defendant's mental, emotional and physical condition (section 4.6), has been obtained and considered;

(v) The court should be directed to consider prior to the imposition of a minimum term whether making a non-binding recommendation to the parole authorities respecting when the offender should first be considered for parole will satisfy the factors which seem to call for a minimum term. Such a recommendation should be required to respect the limitations provided in subsections (ii) and (iii);

(vi) Imposition of a minimum sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a minimum sentence only after a finding that confinement for a minimum term is necessary in order to

protect the public from further criminal conduct by the defendant;

(vii) As provided in section 6.2, the court should be authorized to reduce an imposed minimum sentence to time served upon motion of the corrections authorities made at any time.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

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Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

CARLOS RASHAD GOULD,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fifth Circuits

BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit organization whose primary mission is to promote fair and proportionate sentencing policies by challenging excessive penalties required by inflexible mandatory minimum sentencing laws. FAMM also works to illuminate the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM's interest lies in ensuring that courts construe and apply mandatory minimum sentencing laws in a manner consistent with statutory and constitutional principles. Through education and selected amicus filings in important cases, FAMM works toward realizing its vision of a nation in which sentencing is individualized, humane, and sufficient, but not greater than necessary, to impose just punishment, secure public safety, and support the successful rehabilitation and reentry of offenders.

Properly understood and applied, the "except" clause of 18 U.S.C. § 924(c) represents a step in that direction. FAMM files this brief because it believes that the decisions of the Third and Fifth Circuits in

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Consent letters have been lodged with the Clerk of the Court.

these cases are contrary to the correct interpretation of this statute, good public policy, and the welfare of its members. Those members include Percy Dillon and Mandy Martinson, whose stories are recounted within. Both Dillon and Martinson were sentenced to a mandatory five-year prison term under Section 924(c) over and above the mandatory minimum term applicable by virtue of their drug trafficking convictions under 18 U.S.C. § 841. Unless this Court reverses the decisions below, and if Mr. Dillon does not win his case in this Court,[2] both he and Ms. Martinson, and others like them, will spend a far longer time in prison than is fair or necessary based in part on the Government's flawed understanding of Section 924(c).

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the proper interpretation of 18 U.S.C. § 924(c)(1)(A) (2006). Section 924(c)(1)(A) provides, in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime

[2] *See Dillon* v. *United States*, No. 09-6338 (U.S. argued Mar. 30, 2010).

> (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years.[3]

As Petitioners rightly argue, the plain language of this "except" clause makes the minimum and consecutive features of this penalty non-mandatory if a longer mandatory minimum is imposed at the same sentencing. Abbott Br. 13-36; Gould Br. 7-15. By its terms, Section 924(c) unambiguously declares that the mandatory minimum sentences it authorizes for specified gun offenses do not apply when "a greater minimum sentence is otherwise provided . . . by any other provision of law." Both Petitioners received "greater minimum sentences . . . otherwise provided . . . by any other provision of law." Hence, the "except" clause exempts them from a second but lesser mandatory minimum sentence under Section 924(c). This Court consistently ends its analysis with a

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[3] When Section 924(c)(1)(A) refers to "this subsection" it means the whole of Section 924(c) and its many paragraphs and subparagraphs, including paragraph (c)(5), which contains an "except" clause identical to the one in (c)(1)(A).

statute's plain language when that language is clear, *Badaracco* v. *Comm'r*, 464 U.S. 386, 392 (1984) (noting that where "provisions appear to be unambiguous on their face," their "clear language" controls), unless it "would produce an absurd and unjust result which Congress could not have intended," that is, one that is supported by "no plausible reason." *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998) (internal quotation marks omitted); Gould Br. 7. Petitioners also rightly argue that, unless "the Government's position is unambiguously correct, [this Court] appl[ies] the rule of lenity" to resolve doubts in favor of defendants. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); Abbott Br. 37; Gould Br. 37.

In the face of such arguments, the Government contends that Petitioner's interpretation of the "except" clause is anomalous, illogical, and clearly incorrect. *See* Petition for a Writ of Certiorari at 16-17, *United States* v. *Williams*, No. 09-466 (filed Oct. 20, 2009). This brief addresses the good – and certainly plausible – reasons that Congress would have had for amending Section 924(c)(1)(A) in 1998 to limit its applicability to cases in which a longer mandatory minimum does not also apply. These reasons lend additional support to Petitioners' ample plain-language arguments. They also confirm that the Government's position cannot be unambiguously correct and that therefore, at least, the rule of lenity applies.

Congress had at least two good reasons for moderating the severity of the statute's punishments when it extended its application to one who "possesses a firearm . . . in furtherance" of a crime of violence or drug trafficking crime in 1998. *First*, by 1998 empirical studies had established that it is the relative certainty of detection and penalty rather than the increased severity of punishment that effectively deters crime. All people – especially potential criminal offenders – discount possible future punishment. Studies of state laws similar to Section 924(c) had by 1998 found that additional enhancements have no discernible impact on the rate of violent crime. Congress was aware of these studies, explicitly discussed the concept reflected in them, and as a result had enacted laws ameliorating other mandatory minimum sentences in the 1990s. Hardly absurd, Petitioners' construction of the "except" clause is entirely consistent with an emerging consensus that severe and rigid sentencing approaches were producing anomalous results, leading Congress to take its first halting steps toward sentencing reform.

Second, while Congress indisputably favors incarcerating dangerous persons, it cannot be presumed to embrace the draconian regime that the Government advocates. By 1998, studies had shown that people become dramatically less likely to commit crimes – including weapons violations – as they grow older. It is consistent with prior congressional action, and certainly plausible, that Congress wanted to

ensure that Section 924(c) did not "result in unnecessarily extensive incarceration of people who may have reached an age where they would no longer be dangerous." S. Rep. No. 566-618, at 77 (1983).

If this Court does find the statute's language to be unclear, it ought to apply the rule of lenity and resolve the issue in favor of Petitioners. This brief presents plausible reasons for the "except" clause's limit on multiple mandatory minimums. These reasons, based on empirical data, literature, and congressional action, create sufficient doubts about the Government's position to justify lenity.

ARGUMENT

I. THE "EXCEPT" CLAUSE REFLECTS AN EMERGING CONSENSUS THAT CERTAINTY OF PUNISHMENT, RATHER THAN SEVERITY, DETERS CRIME

By its language, Section 924(c)(1)'s "except" clause plausibly reflects congressional choice. At the same time it was making sure that those convicted of possessing a gun in furtherance of a crime would serve a substantial mandatory sentence, Congress may reasonably have chosen, in 1998, to mitigate Section 924(c)(1)'s rigor by creating an exception where another longer mandatory minimum already applied. Cognizant of case studies and empirical data, and consistent with its own stated concerns regarding the severity of mandatory minimums, Congress may

have purposefully included the "except" to ensure that people did not face significantly longer sentences than needed to achieve Congress's real purpose: deterrence.

Congress originally enacted 18 U.S.C. § 924(c)(1) in 1968, to deter potential criminals from using firearms when committing federal crimes. In the floor debate over passage of the Gun Control Act of 1968, Representative Richard Poff explained that the purpose of the Section 924(c)(1) amendment to the bill was to persuade an offender to "leave his gun at home." 114 Cong. Rec. at 22,231. The amendment carried a one-year mandatory minimum sentence. 18 U.S.C. § 924(c)(1) (1970). The 1998 amendments that created the "except" clause at issue were primarily a response to *Bailey* v. *United States*, 516 U.S. 137 (1995), in which this Court held that mere possession of a firearm could not be punished as "use" of a firearm, which the statute proscribed. The amendments extended Section 924(c)'s penalties to possession in furtherance of a drug-trafficking or violent crime, and added longer graduated mandatory minimum sentences of five, seven, or ten years, depending on whether the firearm was possessed, used, or carried in the commission of the crime, or was brandished or discharged. 18 U.S.C. § 924(c)(1) (2006). Congress explained that the amendment sent a signal: "If you possess a gun in any way to further your violent criminal behavior, you get *a minimum of five years* in the slammer." *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the*

Judiciary, 105th Cong. (1997) (statement of Sen. Helms) (emphasis added), *available at* 1997 WL 235726.

While Congress indisputably wanted to ensure that those who used a gun in committing the designated crimes would spend "a minimum of five years in the slammer," there is no reason that Congress would have favored imposing that mandatory minimum on top of another harsher one. By 1998, National Academy of Sciences studies had repeatedly found that crimes are deterred by perceived certainty of detection and penalty rather than increased severity of punishment. In light of these studies, Congress could have been expected to respond reasonably by including the "except" clause in Section 924(c) to ensure that people did not face significantly harsher punishments than needed to deter.[4]

A. It Is the Certainty of Punishment, Not the Severity, that Deters Crime

As one commentator has noted, "Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels, all appointed

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[4] Thus, for example, the reference to mandatory minimums "otherwise provided by this subsection" served to modify and partially overrule this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993).

by Republican presidents, reached that conclusion, as has every major survey of the evidence. This is also the belief, in my experience, of most experienced judges and prosecutors." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28-29 (2006) (citing National Academy of Sciences reports from 1978, 1986, and 1993). By 1998, empirical studies had revealed this sociological truth – increases in penalties for crimes have little deterrent impact "in many situations where officials place great faith in such increases." Franklin E. Zimring & Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* 203 (1973) (discussing prior studies); *see generally* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65 (2009) (reviewing pre-1998 research). Numerous studies before 1998 had shown that it is the certainty rather than the severity of punishment that is most effective in deterring a criminal act. *See, e.g.*, Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 Econ. Inquiry 297, 297, 308 (1991) (finding that greater certainty of being held accountable resulted in large deterrent effects, while an increase in the severity of punishment had an insignificant effect); Philip J. Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, 2 Crime & Just. 211, 231 (1980) (concluding same based on economic analysis); Charles H. Logan, *General Deterrent Effects of Imprisonment*, 51 Soc. Forces 64, 64 (1972) (finding same).

One explanation for the negligible role that severity of punishment plays in deterrence is the phenomenon of discounting. Simply stated, "each added year in a criminal sentence has a decreasing marginal deterrent effect on crime because criminals (like other people) discount harms that await them far in[to] the future." Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509, 1525 n.92 (2009) (summarizing earlier research). Indeed, most criminals are more focused on the present than the average person. A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 4 (1999) (citing James Q. Wilson & Richard J. Herrnstein, *Crime and Human Nature* 416-21 (1985)). Because they tend to care more about short-term consequences and less about long-term risks than the average person, those charged with crimes are even less likely to be deterred by longer prison sentences. Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 221 (2007) (summarizing earlier research).

What the studies cited above confirm, is that by the time Congress enacted the "except" clause in 1998, the importance of certainty as opposed to severity had become far clearer. Congress, reflecting the larger shift in understanding, could reasonably have taken into account the diminishing returns of increased severity in deciding to include the "except" clause.

B. Empirical Studies of Similar State Laws Show that Firearms Enhancements Have Little or No Deterrent Effect

The understanding of the relative efficacy of certainty and severity in deterring crime evolved between 1968 and 1998 in the specific context of state law sentencing enhancements for firearm possession similar to the mandatory sentence required in Section 924(c)(1). Between 1968 and 1998, a number of empirical studies assessed the impact of these statutes on crime. These studies consistently found that enhanced sentences tied to gun possession or use in the commission of a crime have little or no deterrent effect.

An expansive study undertaken in 1995 analyzed data from almost every state in an effort to determine the effectiveness of sentencing enhancements for firearm possession in felony commissions. Thomas B. Marvel & Carlisle E. Moody, *The Impact of Enhanced Prison Terms for Felonies Committed with Guns*, 33 Criminology 247 (1995). After analyzing almost twenty years of data, most of the enhancement statutes were shown to have had no measurable impact on gun-related crimes.[5]

This result replicated the results of two more detailed studies from the early 1980s of the impact of

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[5] The study showed decreases in certain violent crimes in a few states, which were offset by increases in crime in other states. *Id.* at 275.

mandatory consecutive sentence enhancements on violent crime rates in Michigan and Florida. In 1977, Michigan enacted a felony firearm statute, known as the Gun Law, that was very similar to Section 924(c)(1). *See* Mich. Comp. Laws. § 750.227b (1977). It provided a two-year mandatory consecutive sentence enhancement for any felony committed while possessing a firearm. In 1983, a study assessed the impact of the Gun Law on violent crime rates in Detroit, a city in which the Gun Law was both highly publicized and vigorously enforced. Colin Loftin et al., *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17 Law & Soc'y Rev. 287 (1983). Looking at crime data for the years 1976 through 1978, the study found that the Gun Law had had no discernible effect on the number or rate of violent crimes committed in Detroit. *Id.* at 309.

Two of the authors of the Michigan study next turned their attention to the Florida felony firearm law. Colin Loftin & David McDowall, *The Deterrent Effects of the Florida Felony Firearm Law*, 75 J. Crim. L. & Criminology 250 (1984). Enacted in 1975, the statute imposed a three-year mandatory minimum for any felony committed while possessing a firearm. Fla. Stat. § 775.087(2) (1976). Similar to the Michigan study, the Florida statute was found to have no measurable effect on violent crime deterrence. Loftin & McDowall, *supra*, at 258. The authors, after interviewing incarcerated felons, gave two reasons for the law's ineffectiveness. First, offenders discounted

the additional firearm sentence on top of the already substantial punishment for the underlying felony conviction, so they subjectively perceived no increase in severity. Second, the firearm enhancement did not offset the benefit to the offender that the gun provided for both protection and commission of the crime. *Id.* at 258-59.

C. The "Except" Clause Reflects Congress's Shift in Attitude Towards Increased Severity of Mandatory Minimum Sentences

Both this Court and Congress often look to the states as laboratories for development of the law. Congress's inclusion of the "except" clause in Section 924(c)(1) is consistent with the general deterrence literature and experience under similar state laws. Thus, even as it expanded the length of minimum prison terms for gun crimes, Congress drew the line at piling that minimum on top of another higher one.

This explanation for the "except" clause is borne out by evidence that key members of Congress and Congress itself were signaling the beginning of a shift in attitude toward mandatory minimums. For example, in 1993, Senator Orrin Hatch, at that time the Ranking Republican Member of the Senate Judiciary Committee, wrote a law review article questioning the efficacy and fairness of mandatory minimums, as well as their value in deterring crime. Orrin G. Hatch, *The Role of Congress in Sentencing:*

The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L. Rev. 185 (1993). The following year, the Federal Judicial Center published a report seriously questioning the deterrent impact that mandatory minimums had on crime. Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (Fed. Jud. Ctr. 1994). Finally, in 1994, Congress created a safety valve in mandatory minimum sentencing for drug cases, allowing a sentence below the minimum if the defendant was a low-level participant with little or no criminal history, did not use a weapon, was involved in a violence-free crime, and told the government the truth about her involvement in the offense. *See* 18 U.S.C. § 3553(f) (2006). While Congress stopped short of creating a safety valve specifically for gun crimes, it nonetheless tried to strike a balance between the desire for some certainty and the unreasonable severity of multiple mandatory minimums.

The "except" clause, in other words, is best understood, along with the safety valve, as an early step in the direction of sentencing reform. It appears to reflect Congress's growing awareness that its prior hard-line approaches were not achieving the policy ends it desired. It can be read – as the plain language suggests it should be – as an effort to address some of the excessive severity that has in the years since been generally recognized as a mistake.

D. Congress Plausibly Decided Not to Achieve Marginal Penological Benefits at the Expense of Extraordinary Harm to Individuals

In the face of overwhelming evidence of the limited efficacy of high mandatory minimums, Congress could reasonably determine that the social and personal costs were too great to embrace a policy of stacking mandatory minimum sentences.

The stories of Percy Dillon and Mandy Martinson exemplify the devastating effects of multiple mandatory minimums on individuals of limited criminal culpability. At 23 years old, Dillon was convicted of drug trafficking offenses as well as a weapons violation under Section 924(c). *See* Joint Appendix at 15, 49, *Dillon* v. *United States*, No. 09-6338 (U.S. Jan. 25, 2010), *available at* 2010 WL 326557. Bound by the Sentencing Guidelines, the district court sentenced Dillon at the low end of his range to 322 months (twenty-six years, ten months), which included a sixty-month consecutive sentence for the firearms offense. *Id.* at 21, 49.

When sentencing Dillon, the judge lamented the severity of those sentences, stating, "I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime." *Id.* at 13, 50. In public comments made shortly after the sentencing, the judge said that he did not believe Dillon was likely to benefit from more

than five years in prison. *Id.* at 62.[6] Dillon has now completed seventeen years in prison. If his sentence had not included a 60-month firearms enhancement, he would now be serving his term of supervised release, without regard to the outcome of his case in this Court.[7]

Martinson was a 26-year-old dental hygienist with no prior criminal record and a history of drug abuse when she was convicted of assisting her live-in boyfriend with his drug-trafficking business, and of possessing the gun he had bought her for protection. *See United States* v. *Martinson*, No. 04-3018 (N.D. Iowa Feb. 20, 2005), *aff'd*, 419 F.3d 749 (8th Cir. 2005). Noting that she had been involved in selling drugs for only a brief period, that her involvement had been "due to her drug dependency," and that she had been "largely subject to [her boyfriend's] direction and control," the judge sentenced her to the "lowest possible sentence that the law will allow me to enter."

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[6] When Dillon's own case came before this Court, Justice Kennedy noted that executive clemency, the traditional fail-safe mechanism for unduly long prison terms, has been essentially unavailable in the federal system in recent years. Transcript of Oral Argument at 39, *Dillon v. United States*, No. 09-6338 (U.S. Mar. 30, 2010).

[7] In June 2008, Dillon's sentence was reduced to 22.5 years as a result of the retroactive application of the two-level reduction in the crack guidelines enacted by Congress on November 1, 2007. See S. Ct. App. 30, 31, 37-41. If the Section 924(c) enhancement had not applied to him, Dillon would have been eligible for immediate release at that time. As it is, he is not projected for release until January 2013.

Sent. Tr. at 19, 21. Even so, because of the consecutive five-year term under Section 924(c), Martinson is now serving a 15-year prison sentence.[8]

Both Dillon and Martinson exemplify the type of person who would likely have discounted the risk of mandatory-minimum sentencing, as discussed above. Dillon was a first felony offender at the time he was sent to prison for almost 27 years, and the immaturity noted by the sentencing judge undoubtedly contributed to his reckless disregard for his future. Martinson – as someone who had never even been arrested before, and who was abusing drugs and dependent on her boyfriend – would also likely have been focused on the short-term risks rather than the long-term consequences of her actions. There is no reason to believe that her behavior would have been different if she had known that accepting the gun from her boyfriend would add at least five years to any sentence she might receive for assisting his drug business. Their cases illustrate why the "except" clause was an entirely rational, if modest, reform measure, to give courts the option of exempting people like Dillon and Martinson from an additional penalty under Section 924(c).

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[8] Martinson filed a petition for commutation of sentence with the Department of Justice in May 2010.

II. THE "EXCEPT" CLAUSE REFLECTS A CONGRESSIONAL UNDERSTANDING THAT MULTIPLE MANDATORY SENTENCES ARE UNNECESSARY DUE TO THE AGE-CRIME CURVE

In 2009, more than sixteen years into his prison sentence, Percy Dillon turned forty. He is now over eighty percent less likely to commit a weapons offense than he was during his teenage years; seventy-five percent less likely than he was during his early twenties; and half as likely as he was during his years approaching thirty. But, under the Government's reading, over and above a lengthy sentence for his crack offense, he was required to serve five extra years under Section 924(c).

Consistent with empirical studies and its own previous sentencing reform efforts, Congress could have been expected to consider the age-crime curve in choosing to moderate the expansion of Section 924(c)(1)'s penalties. The "except" clause reasonably reflects Congress's desire to ensure that people like Dillon and Martinson do not remain in prison when they are well beyond the age that they are likely to pose a threat to anyone.

A. People Become Dramatically Less Likely to Commit Crimes as They Age

National arrest and population data demonstrate that people like Dillon and Martinson become significantly less prone to committing crimes as they age. In

the year 2000, for instance, FBI arrest statistics show that a person's likelihood of being arrested for a weapons offense declines by 60% between the late teenage years and the late twenties and by another 50% between the late twenties and late thirties. FBI, *Crime in the United States – 2003*, at 226 tbl.38, *available at* http://www.fbi.gov/ucr/03cius.htm; U.S. Census Bureau, Total Population by Age, Race, and Hispanic or Latino Origin for the United States: 2000, at tbl.1, http://www.census.gov/population/www/cen2000/briefs/phc-t9/index.html.

This statistical trend is known as the age-crime curve (due to the shape of its graphical depiction), and it is remarkably consistent across time, locations, crimes, and demographic subgroups. Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 Am. J. Soc. 552, 554-62 (1983). The age-crime curve is also consistent with the arrest rates of groups that have an above-average likelihood of committing crimes in general, such as recidivist offenders. *See* Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 7 tbl.8 (2002) (finding that recidivism gradually decreases with age, with prisoners released in their mid-forties being 45% less likely to be rearrested for a crime than those released in their late teenage years), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1134.

B. The Age-Crime Curve Has Been Studied Extensively, and Congress Has Relied on this Research in Passing Sentencing Reforms

This strong correlation between age and crime has been studied for centuries. *See* Daniel M. Blonigen, *Explaining the Relationship Between Age and Crime: Contributions from the Developmental Literature on Personality*, 30 Clinical Psychol. Rev. 89, 90 (2010) (citing F.G.P. Neison, *Contributions to Vital Statistics* (1857); A. Quetelet, *Research on the Propensity for Crime at Different Ages* (1831)). Improved data-collection methods spawned studies that examined this correlation over large periods of time and across cultures. A predictable curve emerged, in which one's propensity for criminal actions decreased significantly after young adulthood. *See, e.g.*, Hirschi & Gottfredson, *supra*. These studies created extraordinary interest in the age-crime curve, and later scholars explored its contours, limits, and applicability to varied offenses. *See, e.g.*, Alfred Blumstein, *Violence Certainly Is the Problem – And Especially with Hand Guns*, 69 U. Colo. L. Rev. 945 (1998); David P. Farrington, *Age and Crime*, 7 Crime & Just. 189 (1986); Darrell J. Steffensmeier et al., *Age and the Distribution of Crime*, 94 Am. J. Soc. 803 (1989).

As early as the 1980s, Congress was taking account of the age-crime curve in its sentencing laws. When the Career Criminal Life Sentence Act of 1981 was originally proposed, for example, it mandated life

imprisonment for career offenders. S. 1688, 97th Cong. § 2. The bill was subsequently amended (and then enacted as the Armed Career Criminal Act) to instead impose a fifteen-year mandatory sentence. 18 U.S.C. § 924(e) (2006). This sentence reduction was based in part on "the criminal studies" that "generally show a rapid fall off in the rate of offenses committed by career criminals once they reach [the] general age range of thirty or forty years old." S. Rep. No. 566-618, at 77 (1983).

Similarly, during the floor debates over the Violent Crime Control and Law Enforcement Act of 1993, 42 U.S.C. § 13704 (2006), Senators discussed a Bureau of Justice study that demonstrated how "recidivism rates are linked ... closely with an offender's age." 139 Cong. Rec. S14974 (Nov. 4, 1993) (statement of Sen. Dorgan, referencing Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, at 7 tbl.8 (1989), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1135). And Congress frequently receives reports from the congressionally created U.S. Sentencing Commission on the relationship between age and crime. *See, e.g.*, U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 28 ex. 9 (2004) (finding that recidivism rates decrease with age), *available at* http://ussc.gov/publicat/Recidivism_General.pdf.

C. The "Except" Clause Is Consistent With Congressional Intent to Avoid Needlessly Incarcerating People Who Have Aged Out of Their Risk of Committing a Weapons Offense

The "except" clause is consistent with Congress's continued concern that mandatory sentences should not "result in unnecessarily extensive incarceration of people who may have reached an age where they would no longer be dangerous." S. Rep. No. 566-618, at 77 (1983).

The Government's reading of the "except" clause keeps people like Dillon and Martinson in prison far beyond the age at which they could be considered dangerous. Keeping individuals in prison beyond their thirties and into their forties is associated with only an additional 1% reduction in weapons-violation rates by age group. *See* FBI, *supra*; U.S. Census Bureau, *supra*. Yet in drug cases in which people are sentenced in their mid-twenties – as were Dillon and Martinson – adding Section 924(c) sentences of five or more years on top of ten-year underlying sentences will routinely keep them incarcerated into their forties. *See* 21 U.S.C. § 841(a)(1), (b)(1)(A) (2006) (prescribing ten-year mandatory minimum sentence for a wide variety of drug distribution crimes).

The "except" clause thus reasonably limits the application of multiple mandatory minimum sentences to protect against excessive incarceration, and preserve resources, when people have aged out of

their risk of committing a weapons violation. It is consistent with Congress's growing awareness of the futility and waste of keeping people behind bars after they are no longer dangerous.

For example, in 1995, Congress passed a mandatory minimum sentence of life in prison for persons convicted of certain felonies. *See* 18 U.S.C. § 3559 (2006). Simultaneously, Congress passed a sentence reduction provision giving the Bureau of Prisons the authority to move the sentencing court to reduce the term of persons sentenced under Section 3559 if "the defendant is at least 70 years of age, has served at least 30 years in prison . . . and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community. . . ." 18 U.S.C. § 3582(c)(1)(A)(ii) (2006). In passing the exception, Congress implicitly recognized that any tendency toward dangerousness decreases over time, and that under such circumstances further incarceration may be unwarranted. Section 924(c) reflects and serves the same policy.

III. EVEN IF THE STATUTE WERE UNCLEAR, THE RULE OF LENITY WOULD REQUIRE PETITIONERS' READING OF THE "EXCEPT" CLAUSE

Congress thus had quite good – and certainly plausible – reasons to revise Section 924(c)(1)(A) to limit the imposition of multiple mandatory minimum

sentences, and the plain language of the statute should control. Even if this Court finds the language ambiguous, however, it should nonetheless adopt Petitioners' reading under the rule of lenity. This rule requires this Court "to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Construction of any sentencing statute, including this one, is not properly based on an "assumption that Congress' sole objective was to increase the penalties . . . to the maximum extent possible." *Busic* v. *United States*, 446 U.S. 398, 408-09 (1980) (discussing earlier version of § 924(c)). Petitioners' position must prevail unless "the Government's position is unambiguously correct." *Granderson*, 511 U.S. at 54. In light of the plausible congressional reasons for limiting the application of multiple mandatory sentences – reasons that are based on a wealth of empirical data, literature, and congressional action – the Government's position is certainly not unambiguously correct.

CONCLUSION

The "except" clause of Section 924(c) should be read as its plain language demands: its mandatory enhancement does not apply wherever any other statute to be employed at the sentencing provides a greater mandatory minimum sentence. Congress took a step in the right direction toward sentencing reform in creating this limitation, and it had good reasons for

doing so. Even if this Court views the "except" clause as unclear, these reasons preclude finding the Government's position to be unambiguously correct.

For the foregoing reasons, as well as the reasons stated in the Briefs for Petitioners, the judgments of the courts of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

KEVIN ABBOTT,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

CARLOS RASHAD GOULD,

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UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Title 18 U.S.C. § 924(c)(1)(A) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime" be sentenced to one of a number of mandatory minimum sentences, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

Does the term "any other provision of law" in Section 924(c)(1)(A) include federal drug trafficking offenses and federal firearms offenses?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice, including the correct interpretation of federal criminal statutes and the sound application of federal sentencing law. NACDL's concern for protecting the statutory and constitutional rights of federal defendants has led it to appear frequently as amicus curiae in this Court, including in the October 2009 Term in *Carachuri-Rosendo v. Holder*, No. 09-60, and *United States v. O'Brien*, No. 08-1569.

Several of the cases in which NACDL has participated, including *O'Brien*, involved the statute at issue here. *See, e.g., Dean v. United States*, 129 S. Ct. 1849 (2009) (addressing whether the higher mandatory minimum under Section 924(c)(1)(A)(iii) for discharge of firearm requires proof of intent); *Watson v. United States*, 552 U.S. 74 (2007) (holding that a person who trades a firearm for drugs does not "use" the firearm "during and in relation to . . . [a] drug trafficking crime"); *Lopez v. Gonzales*, 549 U.S. 47

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission The parties have consented to the filing of this brief.

(2006) (holding that conduct deemed a felony under state law but only a misdemeanor under federal law is not a "felony punishable under the Controlled Substances Act" pursuant to Section 924(c)(2)); *Harris v. United States*, 536 U.S. 545 (2002) (holding that "brandishing" a firearm under Section 924(c)(1)(A) is a sentencing factor, not an element of the substantive offense); *Castillo v. United States*, 530 U.S. 120 (2000) (holding that the firearm types in 18 U.S.C. § 924(c) are elements of a substantive offense, not merely sentencing factors).

STATEMENT

1. Section 924(c) of Title 18 of the United States Code makes it a federal crime to use or carry a firearm during and in relation to a federal crime of violence or drug trafficking crime, or to possess a firearm in furtherance of such a crime. The penalties are steep. Wholly apart from a potentially lengthy sentence for the underlying offense, the statute authorizes a court to imprison the defendant for the rest of his life. Also, any prison sentence for a Section 924(c) conviction must be consecutive to any other sentence that the court imposes or that any other court has already imposed. In most cases, that consecutive sentence *must* be at least five years. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A) (requiring a minimum sentence of seven or ten years if the firearm was brandished or discharged and of five years otherwise).

There is an exception to Section 924(c)'s requirement to impose one of these minimum terms of years. The mandatory minimum applies "[e]xcept to

the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. § 924(c)(1)(A). It is beyond dispute that in the two cases before the Court no greater minimum sentence was otherwise provided by "this subsection." The issue, then, is whether minimum sentences provided by 21 U.S.C. § 841 (as in petitioner Carlos Gould's case) or 18 U.S.C. § 924(e) (as in petitioner Kevin Abbott's case) fall within the category of "greater minimum sentence[s]" that are "otherwise provided by . . . any other provision of law."

2. In No. 09-479, Kevin Abbott was convicted by a jury of two drug offenses and two firearms offenses: (1) conspiring to distribute a controlled substance, 21 U.S.C. § 846; (2) possessing more than five grams of cocaine base with intent to distribute, 21 U.S.C. § 841(a)(1) & (b)(1)(B); (3) possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c); and (4) possessing a firearm in violation of the Armed Career Criminal Act ("ACCA"), which makes it unlawful to possess a firearm after three prior convictions of violent felonies or serious drug offenses, 18 U.S.C. § 924(e). The four convictions all stemmed from the jury's finding that Abbott possessed firearms and crack cocaine that the authorities discovered in the same location.

The court imposed concurrent sentences of ten years on each of the two drug counts. As for the Section 924(c) firearms count, Abbott argued that the five-year mandatory minimum did not apply because the second firearms count—under the ACCA—otherwise provided a greater minimum sentence in

his case of fifteen years. *See* 18 U.S.C. § 924(e)(1). Section 924(c)(1)(D)(ii) still required the judge to make any sentence imposed under the Section 924(c) count run consecutively to the sentences on all other counts, but a mandatory minimum should not have restricted the judge's exercise of his sentencing authority under the Sentencing Guidelines and 18 U.S.C. § 3553(a).

The district court rejected Abbott's argument and imposed both mandatory minimums, for a total sentence of twenty years, "noting that several other courts of appeals have held that 'the plain meaning of section 924(c) clearly states that a term of imprisonment imposed under section 924(c) cannot run concurrently with any other term of imprisonment imposed for any other crime, including a sentence under [ACCA].'" No. 09-479, App. to Pet. Cert. 7a (quoting district court opinion). The Third Circuit agreed, concluding that Section 924(c)(1)(A)'s "prefatory clause" containing the exception to the listed mandatory minimums only "mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the future—in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922." *Id.* at 13a.

The court of appeals rejected the Second Circuit's contrary conclusion in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), that the clause—"except to the extent . . . otherwise provided . . . by any other provision of law"—"refers to *any* offense." Pet. App. 13a-14a. The Third Circuit reasoned *inter alia* that "Congress did not intend" the type of "bizarre result"

that might follow from the Second Circuit's ruling. *Id.* at 15a. The Third Circuit explained with a hypothetical involving defendants in separate cases who brandish firearms while distributing different quantities of drugs. Focusing only on the mandatory minimums that would apply, the Third Circuit stated that "a defendant convicted of a predicate offense with a minimum sentence *one day longer* than the relevant minimum under § 924(c) would escape any further punishment while a defendant whose predicate offense carries *exactly the same* minimum sentence provided by § 924(c) sees his total sentence at least doubled." *Id.*

3. In No. 09-7073, Carlos Gould pleaded guilty to two counts of an indictment: (1) conspiracy to possess fifty grams or more of cocaine base with the intent to distribute, 21 U.S.C. § 846; and (2) possessing a firearm in furtherance of that drug trafficking crime, 18 U.S.C. § 924(c). Because the quantity of drugs in the conspiracy count triggered a statutory minimum sentence of ten years, *see* 21 U.S.C. § 841(b)(1)(A), Gould argued that the court was not required to impose the otherwise applicable minimum of five years for possession of a firearm in furtherance of the drug crime. The district court disagreed. After determining that Gould's Guideline range for the drug count was 120 – 137 months, the court sentenced him to 137 months on that count, and imposed a consecutive mandatory minimum of sixty months for the Section 924(c) conviction, for a total sentence of 197 months.

The Fifth Circuit affirmed in an unpublished opinion, relying on its earlier decision in *United States v. London*, 568 F.3d 553 (5th Cir. 2009).

SUMMARY OF ARGUMENT

1. Although a sentence of imprisonment under Section 924(c) may not run concurrently with "any other term of imprisonment"—a phrase that this Court interpreted as broadly as possible because of the choice of the word "any," *see United States v. Gonzales*, 520 U.S. 1, 5 (1997)—Congress enacted an exception to the statute's mandatory minimum provisions that applies under two circumstances. In particular, Section 924(c)(1)(A) directs a court to impose the specified minimum, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

The scope of the circumstances for applying the statutory exception, when considered in context, is clear. First, to determine whether "this subsection" "otherwise provide[s]" for "a greater minimum sentence," a court looks to the rest of subsection (c) where, for example, Congress provided a greater minimum sentence of thirty years for defendants who possess a machinegun. *See, e.g.*, 18 U.S.C. § 924(c)(1)(B)(ii). In applying the second part of the exception, the court looks *beyond* Section 924(c) to "any *other* provision of law" that "*otherwise* provide[s]" a minimum sentence greater than those found in Section 924(c)(1)(A). Congress chose "any"—the most expansive word it could have used

for this situation—and it added no qualifiers to the quoted phrase.

When Congress adopted the "except" clause, the only "other provision[s] of law" on the books that could "otherwise provide[]" an additional "greater minimum sentence" in any case were statutes that criminalize conduct *beyond* that already proscribed in subsection (c)(1). The most commonly employed of those other provisions are found in the Controlled Substances Act ("CSA") and the ACCA, each of which defined in 1998 (and continue to define today) related federal offenses that prosecutors routinely charge in tandem with one or more Section 924(c) counts.

Thus, under the straightforward wording of Section 924(c)(1)(A)'s "except" clause, read in proper context, the "greater minimum sentence" "provided" by the CSA and ACCA in cases such as Gould's or Abbott's is the minimum that applies in lieu of the minimum in Section 924(c)(1)(A).

The government would have this Court alter the operation of the statute by reading "any" other provision of law to mean a contrived category of *hypothetical* provisions of law that Congress *might* some day enact—a set of statutes that today, as in 1998, numbers exactly zero. In the government's view, "any other provision of law" must be understood to refer *only* to "those provisions elsewhere in the United States Code that establish penalties for violating Section 924(c)(1)(A)." Petition for a Writ of Certiorari at 11, *United States v. Williams*, No. 09-466 (U.S. 2009) ("*Williams* Pet."). "[A]ny other provision

of law" thus becomes a null set, because the government readily concedes that *no* other provision of law calls for two or more minimum sentences for the same Section 924(c) violation.

The government resorts to pure, untenable conjecture in an effort to avoid the consequences of its position. It assumes that Congress might have decided to add this second, broader exception to guard against the possibility that a future Congress might decide to enact a new law that imposes higher minimum penalties for conduct [1] that is identical in every detail to the conduct already proscribed by Section 924(c)(1)(A), but [2] is somehow codified in some other, remote statutory provision far away from Section 924(c) or even Title 18, [3] just in case the putative future Congress enacting such an identical penalty provision somehow fails to realize that punishments for this particular conduct already are codified in Section 924(c) and inadvertently adds to the penalties elsewhere. Even putting aside the manifest implausibility of the government's reasoning, or the fact that its adoption would render half of the exception wholly superfluous, the government has proffered no evidence from any legislative record suggesting that such a counterintuitive chain of contingencies was even remotely contemplated by the 1998 Congress.

Lastly, the very best that can be said for the government's position is that Section 924(c)(1)(A) arguably is ambiguous with respect to which precise conduct the "other" sentence must be "provided" for. Yet to claim that a provision might be ambiguous does not render all possible interpretations equally plau-

sible. The government not only insists on the *least* plausible interpretation that might conceivably be articulated—to the exclusion of other interpretations more faithful not only to the text of the statute but to traditional canons of construction—but wholly disregards the rule of lenity.

2. Honoring the statute's straightforward meaning does not lead to the types of undesirable sentencing outcomes of which the government warns. The mandatory minimums at issue in cases such as these set a *floor* for the total sentence. The sentencing judge must also calculate the applicable Sentencing Guidelines and consider each of the seven principal sentencing factors (and various subsidiary factors) in the Sentencing Reform Act before arriving at a total sentence that will be sufficient, but not greater than necessary, to comply with the sentencing purposes that Congress identified. *See* 18 U.S.C. § 3553(a).

From the time Congress added the "except" clause to the present, when judges continue to sentence under the advisory regime remaining in place five years after this Court decided *United States v. Booker*, 543 U.S. 220 (2005), Congress has given judges the tools to calibrate a defendant's total sentence and avoid unwarranted disparity. The government's interpretation, on the other hand, would replace the precision available under Section 3553(a) with the inflexibility of a second mandatory minimum term. The Court need not take the extreme step of disregarding the plain text of the statute, especially where a ruling faithful to that text will better promote Congress's sentencing objectives in federal criminal cases.

ARGUMENT

I. UNDER THE EXPRESS STATUTORY LANGUAGE, THE MINIMUM CONSECUTIVE IMPRISONMENT TERMS SPECIFIED IN SECTION 924(C)(1)(A) DO NOT APPLY WHERE A COURT SENTENCES THE DEFENDANT TO A GREATER MINIMUM SENTENCE UNDER ANOTHER FEDERAL STATUTE.

The language of the "except" clause in 18 U.S.C. § 924(c)(1)(A) is straightforward. The clause applies whenever a greater minimum sentence "is otherwise provided" by the relevant portion of Section 924(c)(1) or by "any other provision of law." In the cases before the Court, greater minimums were provided by two drug and firearm statutes that together account for the lion's share of mandatory minimum sentences in federal cases and that prosecutors almost invariably charge in tandem with Section 924(c) counts. The government's contrary interpretation of the exception to disregard these two sources of greater minimum sentences violates two cardinal rules of statutory construction by adding words of limitation to the statute, and by giving the subsection's key phrase—"any other provision of law"—no rational purpose.

A. Section 924(c)(1)(A)'s "Except" Clause Is Not Confined To Other Provisions Of Law That Set Penalties For The Precise Conduct That Violates Section 924(c)(1)(A).

1. Section 924 of Title 18, entitled "Penalties," specifies prison terms and fines for violations of several federal firearms provisions. Section 924(c), in particular, lists the penalties—including the applicable minimum prison terms—for using, carrying, or possessing a firearm during and in relation to a

crime of violence or a drug trafficking crime. Depending on the firearm type, whether the firearm was more than simply possessed, and the defendant's history of similar violations, mandatory minimum sentences specified in this subsection range from five years to life imprisonment. Section 924(c)(1)(A) directs the sentencing court to impose one of these consecutive mandatory minimum sentences—the lowest being a five-year mandatory minimum for possession of a firearm—"[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection *or by any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added).

By the plain wording of the "except" clause there are two separate circumstances in which a greater minimum sentence applies in place of the minimum in Section 924(c)(1)(A). First, the clause directs a court not to impose Section 924(c)(1)(A)'s mandatory minimum term where "a greater minimum sentence is otherwise provided by this subsection." For example, a ten-year minimum would be imposed if the firearm was "a short-barreled rifle" (§ 924(c)(1)(B)(i)) instead of the five-year minimum that applies for "possess[ing]" any firearm (§ 924(c)(1)(A)(i)). Second, the "except" clause overrides the mandatory minimum provided in Section 924(c)(1)(A) where "a greater minimum sentence is otherwise provided . . . by any other provision of law."

Relevant to the "except" clause's second circumstance, the federal drug statutes and the ACCA are "other provisions" that "provide[]" for a "minimum sentence" that is often "greater" than the lowest minimum specified in Section 924(c)(1)(A). The two cases before the Court turn on whether Congress, in this second circumstance, unambiguously excluded

these greater minimum sentences from the broad phrase "greater minimum sentence . . . otherwise provided . . . by any other provision of law."

2. "[I]n any case of statutory construction, [the] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (explaining that the Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

Petitioners demonstrate that Congress chose expansive language, which the government has successfully urged this Court to interpret broadly where used within the very same subsection. *See* Brief for Petitioner at 13-14, 16, *Abbott v. United States*, No. 09-479; Brief for Petitioner at 11-13, *Gould v. United States*, No. 09-7073. Of course, as petitioners have further explained, no statutory phrase should be considered in strict isolation from "the neighboring words with which it is associated." *See, e.g.*, *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008). The issue, then, is what sources of greater minimum sentences Congress indicated that it was including when it created a penalty override for each greater minimum that "is otherwise provided by this subsection or by any other provision of law."

The context in which the quoted language appears demonstrates that the two most likely sources of greater minimum sentences are the CSA and the ACCA. Of the dozens of mandatory minimum provisions then on the books, only a handful allowed for a

mandatory minimum that could trigger the "except" clause—*i.e.*, one greater than five years. Of that limited universe, these two statutes were far and away the most frequently employed by federal prosecutors. U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 37-38 (1991). Based on the type of conduct that these two statutes penalize—drug trafficking and firearms possession—it is common for one or both to be charged alongside one or more Section 924(c) counts.

It was plain at the time Congress added the "except" clause that these two statutes and Section 924(c) were heavily intertwined. A defendant who uses, carries, or possesses a firearm while engaging in drug trafficking or a crime of violence will be subject to the ACCA's fifteen-year minimum if he has the requisite prior convictions for those types of conduct (drug trafficking or violent felonies) that serve as the only predicates for a Section 924(c) charge. And the CSA is the most commonly charged federal statute that can serve as one of the two predicates. So routine are indictments containing both CSA and Section 924(c) charges that Section 924(c) itself expressly contemplates and addresses how to impose multiple penalties in such a case. 18 U.S.C. § 924(c)(1)(D)(ii) (specifying that a term of imprisonment may not run concurrently with other terms of imprisonment "including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried or possessed").

Congress knew, based on the degree to which these statutes overlap, that of the totality of greater mandatory minimum penalties that the law might

provide when a defendant is being sentenced for possessing a firearm during and in relation to a drug trafficking offense or crime of violence, the vast majority would be for either the drug trafficking that serves as a Section 924(c) predicate or the aggravating circumstance that the defendant possessed the firearm after already being convicted of conduct that itself serves as a Section 924(c) predicate.

3. The government and some courts of appeals, however, narrowly construe "any other provision of law," proposing to create restrictions and qualifiers that Congress did not choose. In departing from the approach taken by the Second and Sixth Circuits,[2] these courts have read "any" other provision of law to mean only "some" other provisions of law.[3]

The difficulty with these various positions is well illustrated by the degree to which the courts and the government have been unable to agree on what the "except" clause means if it does not apply to greater minimum sentences provided by other counts of conviction. Some courts have rewritten the "except" clause to require imposition of a mandatory mini-

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[2] *See United States v. Almany*, 598 F.3d 238 (6th Cir. 2010); *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009); *Whitley*, 529 F.3d at 150.

[3] *See London*, 568 F.3d at 564 (adopting and giving precedential effect to *United States v. Collins*, 205 Fed. Appx. 196 (5th Cir. 2006)); *United States v. Easter*, 553 F.3d 519, 525 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1281 (2010); *United States v. Parker*, 549 F.3d 5, 11 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 1688 (2009); *United States v. Studifin*, 240 F.3d 415, 423-24 (4th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 386 (8th Cir. 2001).

mum found in Section 924(c)(1)(A), except to the extent a greater minimum sentence is otherwise provided by subsection (c) or by another provision of law that punishes firearm-related conduct. *See, e.g.*, *Alaniz*, 235 F.3d at 389 (holding that the "except" clause applies "to the *firearm-related conduct* proscribed either by 924(c)(1) or 'by any other provision of law'" (emphasis added)). Under this view, the ACCA would be included in "any other provision of law," but statutes such as the CSA would not be included, even when used to charge the same drug offense that serves as the predicate for the Section 924(c) violation.

Other circuits have decided to limit the reach of the "except" clause even more, reading "any other provision of law" to mean those other provisions that apply to the same subset of firearm-related conduct already made unlawful by Section 924(c)(1) itself. *See, e.g.*, *Studifin*, 240 F.3d at 423. The government takes this more extreme view, arguing that the other provision of law must "establish penalties for violating Section 924(c)(1)(A)," "[j]ust as the phrase 'this subsection' refers to provisions that prescribe minimum sentences for the Section 924(c) offense." *Williams* Pet. 12. In other words, the phrase "any other provision of law" was designed for other statutes that create new penalties for violations of Section 924(c)(1)(A) *itself*. *Id.* at 13 n.3 (example of hypothetical amendment to Section 922(k) that provides: "if a firearm with a defaced serial number is involved in a violation of Section 924(c)(1)(A), then the penalty for such a violation of Section 924(c)(1)(A) is at least 15 years").

None of these approaches can be squared with the statute as Congress amended it in 1998. The gov-

ernment, undeterred, claims that the relevant words ("is otherwise provided . . . by any other provision of law"), read literally, would require a judge to consider mandatory minimums for "charges pending in other jurisdictions, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing." *Williams* Pet. 13. But a straightforward reading of the exception could not require a judge to take account of the potential sentence for a count that simply is not before the court because the sentence has not even been imposed in the other jurisdiction. The "except" clause, after all, addresses the sentencing phase—not the definition of an offense—and under no fair reading of this statute could it be said that a sentence unavailable to the sentencing court "is otherwise provided" in *that* case by some other provision of law.[4] Thus, the text of the clause need not be artificially restricted in order to avoid the prospect of a court considering mandatory minimums that the court has no authority to apply.[5]

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[4] The government's reference to the relationship between a Section 924(c) sentence and a sentence for charges pending elsewhere is a red herring. No matter which interpretation of the "except" clause prevails, separate federal or state laws that govern sentencing administration in the jurisdiction where the *pending* charge later is sentenced will answer the question whether two consecutive mandatory minimums are imposed. *See, e.g.*, 18 U.S.C. §§ 3584, 3621 *et seq.*

[5] The government's concern about "entirely unrelated counts" likewise presents no reason to resort to an overly restrictive view of the statute. Even today, statutes that could theoretically produce an unrelated count of conviction in a Section 924(c) case routinely provide for minimums of no more than five years and therefore would not trigger the "except" clause. *Compare* U.S. Sentencing Comm'n, *Overview of Statutory Man-*

[Footnote continued on next page]

B. An Interpretation That Limits The Application Of § 924(c)(1)(A) To "Some" Other Provisions Of Law Violates Cardinal Rules Of Statutory Construction.

The government's view—interpreting "any other provision of law" to mean only those other provisions of law that provide mandatory minimum sentences for conduct proscribed by Section 924(c) itself—should be rejected because it violates two cardinal rules of statutory construction. Not only would the government's position render the second exception in the "except" clause superfluous, it would force into the statute words that Congress did not include.

1. As noted above, the government would limit "any other provision of law" to those provisions elsewhere in the United States Code that set a different and higher additional sentence for the Section 924(c) conviction *itself*. *Williams* Pet. 11 (reading the statute to mean *inter alia* that a defendant "is subject to a mandatory consecutive five-year sentence . . . *ex-*

[Footnote continued from previous page]
datory Minimum Sentencing App. B (2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf (listing the number of convictions in FY 2008 under each of various mandatory minimum statutes), *with, e.g.*, 8 U.S.C. § 1324(a)(2)(B) (minimums of three and five years for certain recidivist immigration offenses), *and* 18 U.S.C. § 1028A (minimums of two and five years for certain aggravated identity theft). The drug trafficking and firearms possession statutes that produce related counts of conviction account for almost all minimum sentences that could come into play under the "except" clause. *See Overview of Statutory Mandatory Minimum Sentencing, supra*, at App. B (showing number of mandatory minimum sentences imposed for each statute).

cept that if another feature of the Section 924(c) offense triggers a greater mandatory minimum penalty for that crime under 'any other provision of law,' the defendant is instead subject to that higher sentence on the Section 924(c) count"). But the government concedes the complete "absence of any provision of law outside Section 924(c) that currently prescribes such penalties." *Id.* at 12.[6]

The government therefore proposes to render the words "any other provision of law" superfluous. Doing so would violate a "cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), that courts should "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). Because from the time Congress enacted the "except" clause to the present, no federal statute other than Section 924(c) itself has prescribed an additional minimum sentence for violating Section 924(c), the *first* part of the "except" clause—reaching cases where "a greater minimum sentence is otherwise provided by this subsection"—already fully serves the purpose that the government would attribute to the *second* part of the clause. To adopt the government's reading is to accept that *not a single case* prosecuted under Section 924(c) since the "except" clause was added would have come out differently had Congress omitted the words "or by any other provision of law."

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[6] So narrow is the government's interpretation, it would allow a second consecutive minimum sentence for an offense that contains each *element* of a Section 924(c) violation but fails to make express *reference to* that subsection.

2. In an effort to evade the duty to give effect whenever possible to every word and clause of a statute, the government invents a *conditional* purpose for the language. The government theorizes that the language would operate as a "safety valve" guarding against consecutive sentences in the event a future Congress were to decide to enact a new statute setting new and higher penalties for violating Section 924(c)(1). That theory, untethered to anything resembling reality, is preposterous.

The government's premise is that Congress was looking to the future and "simply reserving the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation." *Studifin*, 240 F.3d at 423 (theorizing that the extra language "any other provision of law" was meant to "reserv[e] the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation"); *accord United States v. Abbott*, 574 F.3d 203, 208 (3d Cir. 2009) (citing for support of this proposition *Collins*, 205 Fed. Appx. at 197-98, which cites *Studifin*, 240 F.3d at 423), *cert. granted*, 130 S. Ct. 1284 (2010)); *London*, 568 F.3d at 564 (adopting *Collins*, 205 Fed. Appx. at 196). Even were legislative history needed to understand the plain reach of this statute, which it decidedly is not, nothing in that record suggests, much less establishes, that Congress had anything like this even remotely in mind.

No doubt the blank record is explained by the fact that the government has built its theory on multiple unsupportable assumptions about what Congress anticipated and intended in 1998 when it included the separate words "or by any other provision of law" in

its amendment of Section 924(c)(1). At a minimum, the Court would need to assume that the 1998 Congress anticipated: (i) that *another* Congress might someday decide to enact a separate penalties law governing conduct already proscribed in Section 924(c), which itself is located in the statute devoted to firearms "Penalties"; (ii) that this new law would add mandatory minimum sentences for Section 924(c) violations even though the 1998 Congress had restructured Section 924(c)(1) for the express purpose of allowing new minimum sentences to be added; (iii) that the new minimums would exceed (yet not replace) the current mandatory minimums; and (iv) that those drafting the future statute would not understand the need to account for the interaction between the putative provision and the one already in existence (which the government used nearly 1,500 times in 1998[7] and which produced nearly 2,500 convictions in 2008[8]).

Not only is the legislative record devoid of even a suggestion that Congress entertained these far-fetched assumptions, had the drafters given even a moment's thought to such a fanciful concern they would have soon recognized that no extra language would be needed to address it. It has long been the rule under the Double Jeopardy Clause of the Fifth Amendment that "in the absence of a clear indication

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[7] Bureau of Justice Statistics, Federal Justice Statistics Resource Program, Number of Defendants Charged Under 18 U.S.C. § 924(c), FY 1998, http://fjsrc.urban.org.

[8] *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* Table 17 n.3. (2008), *available at* http://www.ussc.gov/annrpt/2008/SBtoc08.htm.

of contrary legislative intent," "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments." *Whalen v. United States*, 445 U.S. 684, 692 (1980). The test "to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Thus, if Congress ever added another provision to the United States Code providing a greater minimum sentence for a violation of Section 924(c)—such as the government's hypothetical statute punishing Section 924(c) offenses that involve firearms with defaced serial numbers, *Williams* Pet. 13 n.3—only one of the two penalties would apply because Section 924(c) would be a lesser included offense of the one in the new statute. The Court reaffirmed that rule in *Rutledge v. United States*, 517 U.S. 292 (1996), just two years before Congress created the "except" clause. *Id.* at 297 ("For over half a century we have determined whether a defendant has been punished twice for the 'same offense' by applying the rule set forth in *Blockburger*," and "have often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other.").[9]

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[9] Neither the government nor the courts of appeals have located any statute on the books in 1998 that would have prompted Congress to put special language in Section 924(c) as a way to prevent *additional* (rather than *alternative*) penalties for two violations (either identical violations or a lesser included within the greater violation) of the same statute. *Cf.* 18 U.S.C. § 3559(c)(1) & (7) (setting a life sentence "[n]otwithstanding any other provision of law" for conviction of a "se-

[Footnote continued on next page]

Of course, a future Congress could always override the *Blockburger* rule by clearly stating in the new statute that the greater punishment is cumulative, but that would not explain the decision to add the words "or by any other provision of law" in *this* statute. That is because if a later Congress does decide that the punishments should be separate and cumulative, *that* determination will control no matter how the law was worded in 1998.

3. Not only does the government's rendition give the second part of the "except" clause no purpose, it would require the Court to insert into the statute language that Congress did not decide to include. This Court has routinely resisted calls "to insert words that are not now in the statute." *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968). The reason is grounded firmly in the respective roles of the co-equal branches. To add new words "would, to some extent, substitute the judicial for the legislative department of the government. . . .

[Footnote continued from previous page]
rious violent felony" under the "three strikes" statute, and providing that the defendant "shall be resentenced to any sentence that was available at the time of the original sentencing" if either of the two predicate convictions is later overturned). Simply put, Congress knew in 1998, as it surely knows today, that the easy and expedient way to prevent one statute from imposing cumulative penalties for a single violation of another statute is to place appropriate language (such as "notwithstanding any other provision of law") in the statute containing the higher penalty, rather than guess how future statutes might be worded and then seek preemptively to alter the effect of the predicted wording.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)).

Congress did not limit the "except" clause to greater minimum sentences "otherwise provided by this subsection or by any other provision of law penalizing violations of this subsection." It more broadly worded the exception to cover greater minimum penalties provided by "any other provision of law," a term that at the time—and to this day—most notably includes the greater minimums under the ACCA and the CSA. Congress was careful to qualify the description of a provision of law in Section 924(c) when it wanted to limit the statute's scope. *See* § 924(c)(1)(A) (limiting "any crime of violence or drug trafficking crime" to those "for which the person may be prosecuted in a court of the United States"); *cf. Gonzales*, 520 U.S. at 5 (interpreting "any other term of imprisonment" to include state prison terms because "Congress did not add any language limiting the breadth" of that language). The "except" clause should be enforced consistent with the language Congress enacted rather than the language the government would have preferred.

C. An Interpretation That Limits The "Except" Clause To Only Some Other Provisions Of Law Violates The Rule Of Lenity.

Although the "except" clause, read in context, is clear, to the extent ambiguity arises from the government's proposed interpretation, the rule of lenity requires that the Court construe such ambiguity in favor of the defendant. *Moskal v. United States*, 498 U.S. 103, 107-08 (1990); *Bifulco v. United States*, 447

U.S. 381, 387 (1980); *Busic v. United States*, 446 U.S. 398, 406-07 (1980).

The rule of lenity protects two core values at issue here. Under fundamental notions of due process, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). "To make the warning fair, so far as possible the line should be clear." *Id.* Second, "legislators and not the courts should define criminal activity." *Huddleston v. United States*, 415 U.S. 814, 831 (1974). Protecting the line between the co-equal branches helps ensure that no citizen is "subjected to punishment that is not clearly prescribed" and it "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality op.).

This principle of statutory construction applies equally to the substance of criminal prohibitions and the penalties imposed for violations of them. *See Bifulco*, 447 U.S. at 387 (citing cases). Thus, even assuming the government can succeed in injecting ambiguity where none exists, lenity requires resolving it against the government, because when a statutory term is unclear, courts "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (citing *United States v. Bass*, 404 U.S. 336, 347-48 (1971)); *see also Whalen*, 445 U.S. at 693-94 (resolving ambiguity regarding the authorization of consecutive sentences in favor of lenity).

II. GIVING § 924(C)(1)(A) ITS PLAIN AND STRAIGHTFORWARD MEANING WOULD AUTHORIZE COURTS TO IMPOSE SENTENCES SUFFICIENT, BUT NOT GREATER THAN NECESSARY, TO ACHIEVE THE PURPOSES OF PUNISHMENT.

1. The government nonetheless alludes to the rare exception in which courts will disregard a statute's plain meaning based on the results such a reading would produce. *Williams* Pet. 16, 17 (referring variously to the available sentences in certain Section 924(c) cases as "illogical," "anomalous," and "bizarre"). But this interpretive tool has no role to play under a statutory scheme that, after requiring imposition of the greatest minimum sentence, reserves to the sentencing court its traditional power to impose a *total* sentence properly calibrated to the defendant's level of culpability and dangerousness. The straightforward interpretation of Section 924(c) in no way requires a judge to give a lower sentence (or even the same sentence) to the more culpable or dangerous of two defendants.

As an initial matter, the bar is a fair bit higher than the government suggests. This Court does not override the wording of a statute simply because the occasional application would be anomalous, illogical, or even bizarre. Rather, the reading of the statute must produce an "absurd and unjust result which Congress could not have intended." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (internal quotation marks omitted).

The government cannot even meet its own proposed test. A mandatory minimum sentence is, quite simply, nothing more than a minimum. It is a lower limit on the judge's discretion, just as a statutory maximum acts as an upper limit. Under 18 U.S.C.

§ 3553(a), a judge considers numerous factors—including the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense—in deciding how far above the minimum a defendant's sentence should be. Only by ignoring the overall context in which a mandatory minimum provision operates could the government contend that illogical outcomes are likely to flow from reading the statute to mean what it says.

Not only are the mandatory minimum sentences in a Section 924(c) case the starting point in a judge's determination of the appropriate sentence, the Section 924(c) count almost always is included with at least one other count carrying a lengthy maximum prison term. That is due, in no small part, to the fact that a violation of Section 924(c) does not occur unless the defendant uses, carries, or possesses a firearm during and in relation to another federal offense—either a crime of violence or a drug trafficking crime. The drug trafficking statute, for example, contains several maximum terms, depending on the quantity of drugs and the defendant's prior record. Aside from cases involving small quantities of marihuana, the shortest maximum is ten years. *See* 21 U.S.C. § 841(b).

2. The Sentencing Commission has drafted the Guidelines to account for the effect a Section 924(c) conviction can have on the total sentence, and the objective of those provisions is to avoid unwarranted disparity. For example, the drug trafficking Guideline contains a two-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed." U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (2009) ("U.S.S.G."). But if the defendant also re-

ceives a mandatory minimum sentence under Section 924(c) for using or carrying a firearm during and in relation to the drug trafficking crime, the Guidelines instruct the court not to apply the Guidelines enhancement. *See id.* § 2K2.4 cmt. n.4. Thus, a defendant in criminal history category III who carries a gun while distributing four kilograms of cocaine would have a Guideline range of 121 – 151 months with a Section 924(c) conviction, and a range of 151 – 188 months without one. With a five-year mandatory minimum under Section 924(c)(1)(A)(i) the effective range for that defendant would be 181 – 211 months. Because the drug trafficking crime carries a maximum sentence of forty years (or a maximum of life if the defendant has a prior drug trafficking conviction), the court would have ample latitude to impose a sentence—through a departure from the Guidelines or, if needed, as a variance—that achieves the purposes of sentencing.[10]

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[10] The statute does not bar a judge from imposing a consecutive sentence of imprisonment under Section 924(c) even if the "except" clause applies. The simple difference in such cases is that the sentence imposed under Section 924(c) need not be any particular minimum length. A number of other federal criminal statutes also require mandatory consecutive sentences without a required minimum term. *See, e.g.*, 18 U.S.C. § 924(a)(4) (requiring consecutive sentence, but with no minimum, for possessing firearms in a school zone); 18 U.S.C. § 3146(b)(1)-(2) (same for failure to appear in court or for service of sentence); 21 U.S.C. § 865 (same for smuggling certain controlled substances while participating in a program for facilitated entry into the country). Moreover, the Sentencing Commission is experienced in drafting Guidelines to account for such statutes. *See, e.g.*, U.S.S.G. §§ 2J1.6 cmt. n.3 (failure to appear); 3C1.3 cmt. n.1 (offense while on release).

The Commission expressly contemplated and addressed the unusual case where, even under the government's interpretation, a conviction under Section 924(c) might cause a lower overall sentence than would be the case without the conviction. U.S.S.G. § 2K2.4 cmt. n.4. The Guidelines state that "[i]n such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment." *Id.* Just as the Commission has expressly provided for adjustments that address this type of anomaly under the mandatory minimums in Section 924(c), nothing prevents a judge from exceeding the Guidelines range in the unusual case where a defendant faces a lower mandatory minimum sentence by operation of the statute and a higher sentence is needed to serve the purposes of sentencing under Section 3553(a).

In fact, a judge would not even need to depart or use a variance to avoid the supposed problem asserted by the government, because the Guidelines already address it. The government argued in *Williams* that a defendant who distributes five kilograms of cocaine and brandishes a firearm would only be subject to a ten-year minimum, *see* 21 U.S.C. § 841(b)(1)(A), while a defendant who distributes 500 grams of cocaine and brandishes a firearm would face a combined minimum of twelve years, *see* 21 U.S.C. § 841(b)(1)(B) (five-year minimum); 18 U.S.C. § 924(c)(1)(A)(ii) (seven-year minimum). *See Williams* Pet. 16-17. But the government quits its analysis at the first step of a multi-step sentencing process. Under the Guidelines the defendant delivering the larger quantity of drugs faces a Guidelines range higher than the total sentence range (including the mandatory minimum) applicable to the de-

fendant who distributed the smaller quantity.[11] And the range is higher still if the more culpable defendant has a prior record.

The "except" clause does not distort sentencing outcomes, because the Guidelines, along with the other Section 3553(a) sentencing factors, help guide judges as they seek an appropriate sentencing result. Even before *Booker*, judges could depart from the applicable Guidelines to avoid absurd—and even "bizarre"—outcomes. 543 U.S. at 234 (noting that the Guidelines as mandatory permitted departures to account for circumstances not adequately considered by the Sentencing Commission); *Koon v. United States*, 518 U.S. 81, 92-96 (1996) (recognizing that the Guidelines vest discretion in sentencing courts to depart from the applicable sentence range to account for factors not expressly contemplated by the Guidelines); *see, e.g.*, *United States v. Pool*, 937 F.2d 1528, 1534 (10th Cir. 1991) ("To permit appropriate sentencing under anomalous circumstances, the Guidelines allow the trial court to depart upward or downward from the Guidelines as the situation dictates. The degree of departure is within the sound discretion of the sentencing court."). Section 3553(a), as applied after *Booker*, gives judges even greater power to ensure that a sentence is sufficient, but not greater than necessary, to achieve the purposes of sentencing. A judge who has the power to "avoid unwarranted sentencing disparities," § 3553(a)(6),

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[11] Five kilograms of cocaine and possession of a firearm yields an offense level of thirty-four and a range of 151 – 181 months (twelve years, seven months to fifteen years, one month). U.S.S.G. § 2D1.1(b)(1) & (c)(4) (2009).

and to tailor the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," § 3553(a)(2)(A), is fully capable of applying Section 924(c) in a manner that is both consistent with Congress's purpose and true to the language of the statute that Congress enacted.[12]

3. The government's interpretation, if adopted, would hamper the ability of judges to accomplish the statutory purposes of sentencing. The Sentencing Commission itself noted in its comprehensive review of such penalties that "lack of uniform application" of mandatory minimums by the government "creates unwarranted disparity in sentencing, and compromises the potential for the guidelines sentencing system to reduce disparity." *Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*,

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[12] This power, which Congress trusts judges to exercise when determining the appropriate punishment for a vast array of serious federal crimes, fully answers the assertion that the 1998 Congress must have been on a single-purpose mission to double up the use of mandatory minimums in cases where two mandatory minimums could be triggered. As an initial matter, it is at least equally likely that when adding to substantial mandatory minimum terms capable of putting a person behind bars for much of the rest of his life, Congress saw little marginal utility in funding another five years of prison at the end of such a term. And it is much more likely that Congress chose to rely on judges to make that determination based on the age of a defendant, the total sentence that will apply on all of the counts in the case, and other important case-specific factors for which Section 924(c)'s mandatory minimum provision does not account.

at ii-iii. The Commission has long noted that "disparate application" of mandatory minimums "appears to be related to the race of the defendant" and "to the circuit in which the defendant happens to be sentenced." *Id.* at iii (noting that mandatory minimums, in contrast to Sentencing Guidelines, "are wholly dependent upon defendants being charged and convicted of the specified offense under the mandatory minimum statute," that "the power to determine the charge of conviction rests exclusively with the prosecution" for cases that do not go to trial, and that, as a result, "mandatory minimums transfer sentencing power from the court to the prosecution"); *see also* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 90 (2004) (in 1995 "Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56 percent of those who were charged under the statute and 64 percent of those convicted under it," and data from 2000 "showed the same pattern of disproportionate overrepresentation of Blacks among qualified offenders who actually received the statutory enhancement").

Wholly apart from the disparity in how the government chooses to invoke mandatory minimums, it appears that "an unintended effect of mandatory minimums is *unwarranted* sentencing uniformity" in which "offenders seemingly not similar nonetheless receive similar sentences." *Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*, at iii. The reason is simple: "[T]he structure of the federal sentencing guidelines differentiates defendants convicted of the same offense by a variety of aggravating and mitigating factors, the consideration of which is meant to provide just punishment and proportional sentences," while "the structure of man-

datory minimums lacks these distinguishing characteristics." *Id.* "Whereas guidelines seek a smooth continuum, mandatory minimums result in 'cliffs'" that "compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act." *Id.* at iv.

The mandatory minimum feature of Section 924(c), as amended, still takes account of only a small number of differences between offenses and offenders (*i.e.*, type of firearm, whether it was used or displayed in a particular way, and the defendant's previous convictions for similar conduct). It is a far cry from the "system of finely calibrated sentences" that Congress intended when it created the Sentencing Guidelines. *See Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*, at iv. Nor did Congress give any indication that the 1998 amendment was intended to compound the disparity and the lack of proportionality that characterizes mandatory minimums where another statute *already* provides for a greater minimum sentence, often for substantially overlapping conduct.

4. The "except" clause properly affords district courts the latitude to determine the appropriate length of a sentence that will *always* be *in addition to* a mandatory minimum greater than five years. These two cases are illustrative. Gould was subject to a mandatory minimum under the CSA of ten years. The district court had the statutory authority to sentence him to a maximum of life imprisonment on that count alone. Abbott received a fifteen-year sentence under the ACCA. That statute, according to the Court, allows for a maximum term of life imprisonment wholly apart from any consecutive sentence under Section 924(c). *Custis v. United States*,

511 U.S. 485, 487 (1994). In both cases, the sentencing judge followed the government's interpretation of Section 924(c)(1)(A) and imposed mandatory minimum terms of five years consecutive to the lengthy sentences on the other counts. Under a proper reading of the statute, the length of any additional sentences beyond the applicable minimum would have been governed by Section 3553(a), which requires the judge to consider all of the statutory purposes of sentencing and apply them to the facts of a particular case.

The "except" clause does not guarantee defendants shorter sentences. It merely affords the sentencing court appropriate discretion—the type of discretion exercised by federal judges every day in every sentencing hearing that is governed by Section 3553(a). A proper reading of Section 924(c)(1)(A) will not force judges to follow some unfamiliar standard, nor will it inject uncertainty or complexity into the sentencing process. Instead, it will be faithful to Congress's command that when a greater mandatory minimum is already provided by law, the length of the additional sentence should be guided in part by the considered judgment of the Sentencing Commission, which this Court notes has "examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate," *Rita v. United States*, 551 U.S. 338, 349 (2007), and that the sentence ultimately imposed be "sufficient, but not greater than necessary, to comply with the purposes" of any federal sentence. 18 U.S.C. § 3553(a).

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for a proper application of Section 924(c)(1).

Respectfully submitted.

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